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No. ——

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

TERRITORIAL COURT OF THE VIRGIN ISLANDS,
Petitioner,

v.

JAMES R. RICHARDS, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Is the Department of the Interior—an executive branch agency—authorized by statute and constitutionally permitted under the Separation of Powers to audit a court in the judicial branch of the Virgin Islands?

PARTIES TO THE PROCEEDINGS

Petitioner and plaintiff-appellant below the Territorial Court of the Virgin Islands is a court of record established in 1977 pursuant to 48 U.S.C. § 1611. *See* 4 V.I.C. § 2. Respondent James R. Richards was defendant-appellee below, in his capacity as Inspector General, Office of Inspector General, United States Department of the Interior. Defendant-appellee below Neal H. Littlefield, in his capacity as Regional Audit Manager, Caribbean Region, St. Thomas, V.I., Office of Inspector General, United States Department of the Interior, has been succeeded by Roger LaRouche. *See* S. Ct. Rule 40.3.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner the Territorial Court of the Virgin Islands respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in the above-entitled proceeding on May 27, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is reported at 847 F.2d 108, and is reprinted in the appendix hereto ("App.") at 1a. The memorandum of the District Court of the Virgin Islands (O'Brien, J.) is reported at 673 F. Supp. 152, and is reprinted at App. 14a. A memorandum of the District Court granting a stay is reported at 674 F. Supp. 180, and is reprinted at App. 36a.

JURISDICTION

Petitioner filed an action against respondents for declaratory and injunctive relief on January 23, 1987, in

the District Court of the Virgin Islands, and respondents filed a counterclaim to enforce a subpoena. On October 21, 1987, the District Court granted respondents' application for enforcement and dismissed petitioner's complaint with prejudice. App. 14a, 34a. Petitioner appealed, and the District Court stayed its order pending appeal. App. 36a. On May 27, 1988, the Court of Appeals affirmed. App. 1a, 12a. The jurisdiction of this Court to review the judgment of the Third Circuit rests on 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional and statutory provisions pertinent to this case include Article IV, Section 3, Clause 2 of the United States Constitution; Sections 17, 21, and 30 of the Revised Organic Act of 1954, 48 U.S.C. §§ 1599, 1611, and 1544; 28 U.S.C. § 610; and Section 2 of Title 4 of the Virgin Islands Code. These provisions are set forth at Appendix F.

STATEMENT OF THE CASE

On May 13, 1986, respondent Neal H. Littlefield, the Caribbean regional auditor for the Inspector General of the Department of the Interior, notified the Honorable Verne A. Hodge, Presiding Judge of petitioner the Territorial Court of the Virgin Islands, that he proposed to audit the Territorial Court. The ostensible goals of the audit included determining "whether the Territorial Court was achieving its program directives." App. 16a. The Territorial Court had never before been directly audited by the Inspector General,[1] and Judge Hodge ex-

[1] App. 16a. *See also* Affidavit of Presiding Judge Verne A. Hodge, ¶ 8 (June 22, 1987), Cir. Ct. App. A-262; Affidavit of Neal H. Littlefield, ¶ 5 (March 16, 1987), Cir. Ct. App. A-349 ("the Office of Inspector General had never conducted an audit of the Territorial Court").

pressed strong concerns about the audit during initial meetings with the executive branch officials who proposed to scrutinize the court's records and procedures. The Territorial Court also retained counsel, who determined that Interior lacked the authority to conduct the audit. App. 17a.

On January 23, 1987, the Territorial Court filed suit in the District Court of the Virgin Islands, seeking declaratory and injunctive relief barring the audit. The Territorial Court's consistent position throughout the litigation has been that it is in no sense opposed to a proper audit of its operations, but that such an audit must be performed by a judicial branch agency—specifically, the Administrative Office of the United States Courts ("AO")—and that the Department of the Interior —an executive branch agency—lacks the statutory and constitutional authority to probe the workings of the court. App. 3a.[2]

After the complaint was filed, but on the same day, respondent James R. Richards—Interior's Inspector General—served a subpoena *duces tecum* on the Clerk of the Territorial Court, purporting to require production within ten days of a broad range of court records. The Territorial Court moved to quash the subpoena, and Interior filed a counterclaim seeking enforcement of the subpoena, as well as a motion for summary enforcement.[3]

On October 21, 1987, the District Court issued an order granting Interior's application for summary enforcement,

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[2] The complaint also sought relief, in the event the District Court determined that the audit could go forward, "defining and limiting the scope of the defendants' authority so as to preclude any usurpation of judicial responsibility" and requiring compliance with specified auditing standards. Complaint, Cir. Ct. App. A-438.

[3] The parties entered into a stipulation providing that the Territorial Court would not be required to turn over any documents covered by the subpoena until final decision by the District Court. App. 4a.

directing the Territorial Court to comply with the subpoena within 30 days, and dismissing the Territorial Court's complaint with prejudice. App. 34a-35a. In its Memorandum accompanying the Order, the District Court rejected the argument that the separation of powers precluded an executive agency from auditing the Territorial Court. The District Court acknowledged that "Congress established three separate departments of government for the Virgin Islands, that is, the executive, judicial, and legislative branches," but the court ruled that "this system as applied to the Virgin Islands government is not of a constitutional nature" but rather "exists only by virtue of the legislative grace of Congress." App. 23a.

The District Court next ruled that Interior was authorized to audit the Territorial Court by Section 17 of the Revised Organic Act of 1954. App. 18a-19a. Added in 1982, that provision transferred from the government comptroller of the Virgin Islands to Interior's Inspector General "[t]he authority to audit all accounts pertaining to the revenue and receipts of the government of the Virgin Islands * * *." 48 U.S.C. § 1599(a)(1). The District Court rejected the Territorial Court's contentions that "government" in the quoted passage did not include the judicial branch of the Virgin Islands, and that the scope of Interior's authority over the judicial branch was limited by Section 30 of the Revised Organic Act. App. 26a-32a. That latter provision specifies that "the President is authorized to place all matters pertaining to the government of the Virgin Islands under the jurisdiction of the Secretary of the Interior, except matters relating to the judicial branch of said government which on July 22, 1954 are under the supervision of the Director of the Administrative Office of the United States Courts * * *." 48 U.S.C. § 1544.[4]

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[4] As enacted, Section 30 referred to "matters relating to the judicial branch of said government which on the date of approval

The Territorial Court filed a notice of appeal and moved in the District Court for a stay pending appeal. On November 17, 1987, the District Court entered a Memorandum and Order granting the stay. App. 36a. The District Court recognized that the case presented "a unique issue" of "first impression" involving "the constitutional assignment of power," and that "[t]he people of the Virgin Islands have a strong interest in having the relationship of the respective levels of government clearly defined." App. 42a.

On May 27, 1988, the Court of Appeals affirmed. App. 1a. The Third Circuit agreed with the District Court that "government" in Section 17 included the judicial branch. The Court of Appeals also agreed that Section 30 did not limit Interior's authority to audit the Territorial Court, reasoning that Section 30 only prohibited delegation to Interior of those matters relating to the judicial branch that were under the AO in 1954. According to the Third Circuit, the AO had express authority in 1954 to audit the District Court of the Virgin Islands, but not the Territorial Court or its predecessors. App. 7a. Thus, Interior could not audit the District Court, but was free to audit the Territorial Court. Finally, citing only a dissenting opinion in a case from this Court, the Court of Appeals concluded that separation of powers principles did not preclude Congress from authorizing an executive agency to audit the Territorial Court. The court below assumed that the separation of powers was "viable as among the branches of the territorial government," but ruled that the doctrine

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of this Act are under the supervision" of the AO. 68 Stat. 497, 509-510. The Act was approved on July 22, 1954.

The District Court did not address the Territorial Court's claims for declaratory and injunctive relief restricting the audit to avoid interference with judicial responsibility, which the Territorial Court had sought in the event the audit were permitted to proceed. *See supra* n.2.

nevertheless did not restrain congressional authority to "'make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.'" App. 8a (quoting U.S. Const. art. IV, § 3, cl. 2).[5]

REASONS FOR GRANTING THE WRIT

This case presents important questions concerning the independence of the Territorial Court of the Virgin Islands. The resolution of those questions, however, is of broader significance, and will affect the independence and stature of the other territorial courts, from Guam to American Samoa to Puerto Rico. The Territorial Court has pursued this litigation primarily because of the command in Canon 1 of the Code of Judicial Conduct, which prescribes that "[a]n independent and honorable judiciary is indispensable to justice in our society" and which imposes on judges an obligation to help ensure that "the integrity and independence of the judiciary may be preserved." The decision below—authorizing an executive branch agency to probe the workings of a court, and ruling that the separation of powers is wholly unavailable to protect that court from any intrusions by the federal executive agency—threatens the integrity and independence of the territorial judiciary, and should not be permitted to stand.

To reach its ruling, the court below adopted a radically new approach to the recurring question of whether constitutional protections apply to the territories. Since the famous *Insular Cases*,[6] in which this Court held that

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[5] The Third Circuit denied a stay of the District Court's order, but Interior has conceded that because of the continuing nature of this dispute, the case will not become moot even if Interior conducts the challenged audit. *See* Appellees' Opposition to Motion for Stay of Mandate (June 16, 1988), at 5-6. To date, no such audit has been undertaken.

[6] *Downes* v. *Bidwell*, 182 U.S. 244 (1901); *Armstrong* v. *United States*, 182 U.S. 243 (1901); *Dooley* v. *United States*, 182 U.S. 222 (1901); *De Lima* v. *Bidwell*, 182 U.S. 1 (1901).

the Constitution as a whole did not automatically follow the Flag, the Court has been engaged in the process of selecting those constitutional protections that are applicable in the unincorporated territories, and those that are not. The court below assumed that the separation of powers applied *within* the Virgin Islands, but that the doctrine could not be invoked in the face of *federal* intrusions. App. 8a. Specific constitutional protections may or may not apply in the territories, but, if they do, they apply with full force. The decision below—finding a constitutional protection applicable but recasting it—threatens to unsettle this Court's established approach to applying the Constitution to the territories.

I. The Court Below Erred In Concluding That An Executive Branch Agency Was Authorized To Audit The Judicial Branch Of The Virgin Islands

The Revised Organic Act of 1954 is the basic charter of the Virgin Islands. 48 U.S.C. §§ 1541-1645. The Act is divided into seven subchapters, entitled "general provisions," "bill of rights," "legislative branch," "executive branch," "judicial branch," "system of accounts," and "fiscal provisions." The court below relied upon Section 17 of the Act, 48 U.S.C. § 1599—found within the "executive branch" subchapter—in ruling that the Department of the Interior had been granted the authority to audit the Territorial Court—an entity within the judicial branch.

Section 17 specifies that certain enumerated responsibilities, previously vested in the government comptroller of the Virgin Islands, are transferred to Interior's Inspector General. Among the transferred responsibilities is "[t]he authority to audit all accounts pertaining to the revenue and receipts of the government of the Virgin Islands * * *." 48 U.S.C. § 1599(a)(1). Pursuant to 48 U.S.C. § 1599(b), "[t]he authority granted in paragraph (a) of this section shall extend to all activities of the government of the Virgin Islands * * *." The court

below relied upon these provisions in sustaining the authority of the Department to probe the workings of the Territorial Court, noting "the breadth of the language employed in the statute and the lack of any valid reason why Congress would want to exclude the other two branches of the territorial government from its auditing supervision." App. 6a.

Neither reason is persuasive. Section 17 is within the subchapter of the Organic Act dealing with the executive branch, and thus the authority conferred on the auditor by that Section should be understood as limited to the executive branch. Significantly, Congress did not place the Section describing the auditor's authority in either the "general provisions" or the "fiscal provisions" subchapter, which would have indicated more general applicability.

Quite apart from the structure of the statute, the language employed by Congress refutes an interpretation extending the auditor's authority into the judicial branch. Section 17 authorizes Interior to audit "the government." When Congress, the courts, and even the Department of Justice use the word "government," they typically do not mean to include the judiciary.

For example, while the Department of Justice was arguing below that the plain meaning of the word "government" included the judicial branch, it was issuing regulations construing the word "government" in the Immigration Reform and Control Act, 8 U.S.C. § 1255(a)(2), to mean *only* the Immigration and Naturalization Service.[7]

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[7] *See* 8 C.F.R. § 245a.1(d) (1988) ("In the term 'alien's unlawful status was known to the government,' the term 'government' means the Immigration and Naturalization Service"). *See also Ayuda Inc.* v. *Meese*, No. 88-625 (D.D.C. March 30, 1988) (enjoining same regulation on ground that "government" includes any federal agency); *Farzad* v. *Chandler*, 670 F. Supp. 690 (N.D. Tex. 1987) (same), *appeal pending*; *Foster* v. *Bork*, 425 F. Supp. 1318, 1320 (D.D.C. 1977) (judicial branch not susceptible to designation as "federal agency").

The most common use of the word is typified by Department of Energy regulations flatly stating that " 'Government' means the Executive Branch of the United States Government." 10 C.F.R. § 1017.3(i). The Solicitor General routinely uses "government" in his briefs to refer to the executive branch,[8] as does this Court in its opinions.[9]

More significantly, Congress frequently uses the term when it intends to exclude the judicial branch. Thus, the federal statute providing for open public meetings expressly does not cover the courts, *see* 5 U.S.C. § 551(1), yet Congress did not think it would be confusing to dub the statute the "Government in the Sunshine Act." 5 U.S.C. § 552b. Courts have, in a variety of contexts, ruled that the word "government" in statutes and rules does not include the judicial branch.[10] In short, contrary to the Government's argument below, the word "government" is hardly an unambiguous term with plain mean-

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[8] *See, e.g.*, Brief for the United States as Amicus Curiae in No. 86-473, *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation*, at 20 n.33 (statute "authorizes the federal government to bring civil actions for injunctive relief"). The judiciary responsible for deciding the civil actions is obviously not included in the "government" bringing them.

[9] *See, e.g., International Paper Co.* v. *United States*, 282 U.S. 399, 406 (1931) ("The Government has urged different defenses") (Holmes, J.); *Springer* v. *Government of the Philippine Islands*, 277 U.S. 189, 200 (1928) (referring to "the contention of the Government" that legislative branch lacked authority at issue).

[10] *See, e.g., United States* v. *Trejo-Zambrano*, 582 F.2d 460, 465 (9th Cir. 1978) (" 'Government' as used in this rule refers to the office of the prosecutor and related executive agencies and does not refer to officers of the court"); *United States* v. *Trevino*, 556 F.2d 1265, 1271 (5th Cir. 1977) (rejecting argument that "the word 'government' * * * should be interpreted broadly enough to cover courts or probation officers"); *Foster* v. *MacBride*, 521 F.2d 1304, 1305 (9th Cir. 1975) (federal judge is not "employee of the government" as term is used in Federal Tort Claims Act, 28 U.S.C. § 1346); *contra United States* v. *LePatourel*, 571 F.2d 405 (8th Cir. 1978).

ing, and in fact its most standard use throughout the three branches excludes the judiciary.

The common sense reading of Section 17—viewing "government of the Virgin Islands" as referring to the executive branch—is confirmed by the legislative history of the Revised Organic Act. The Senate Report on that Act noted that one of its purposes was to "establish[] a single islandswide legislature, and direct the Governor to reorganize the two municipal governments into a single *Virgin Islands government* of not more than nine *executive* departments." S. Rep. No. 1271, 83rd Cong., 2d Sess. 6-7 (1954) (emphasis supplied). The Governor certainly had no authority to reorganize the judiciary, nor was the judiciary one of the nine executive departments. The draftsmen thus considered "Virgin Islands government" to refer to the executive branch. Judicial decisions in the immediate wake of the 1954 Act similarly regarded the "government" as limited to the political branches.[11] Congress must therefore be assumed to have used the phrase in the same sense when it amended the Act to confer certain auditing authority over the "government of the Virgin Islands" on the Inspector General of the Department of the Interior.[12]

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[11] *See, e.g., Ottley* v. *De Jongh*, 149 F. Supp. 75, 80 (D.V.I. 1957) (noting that "neither the Government of the Virgin Islands, nor either of its branches, to wit: Legislative or Executive, has been made party-defendant" in case before court); *Virgin Islands Housing & Redevelopment Auth.* v. *19.1078 Acres of Land*, 161 F. Supp. 475, 478 (D.V.I. 1958) (concluding that "Government of the Virgin Islands" as used in Sections 16 and 27 of Act, 48 U.S.C. §§ 1597 & 1617, comprised "the executive departments and the departmental boards and commissions," as well as "the independent boards, agencies, authorities, commissions and other instrumentalities required by Federal law for participation in Federal programs").

[12] The Government argued below that the Inspector General should be considered to have the authority to audit the Territorial Court because the former comptroller general of the Virgin Islands in fact audited predecessors to the Territorial Court. The court below did not rely on any such alleged historical practice, and for

The court below could find no "valid reason" why Congress would not want to include the judicial branch in the auditing authority conferred on the Department of the Interior. App. 6a. Congress itself, however, had reason enough to insulate the judicial branch from the authority of the Department, and expressly did so in Section 30 of the Act, 48 U.S.C. § 1544. That provision authorized the President to place all matters pertaining to the Virgin Islands under the Secretary of the Interior, "except matters relating to the judicial branch of said government which on July 22, 1954 are under the supervision of the Director of the Administrative Office of the United States Courts * * *."

The express carving out of the judicial branch from the scope of Interior's authority evinces congressional concern over executive branch intrusion into the territorial courts. The legislative history of Section 30 confirms a broad congressional intent to prevent the judiciary from being subjected to Interior's jurisdiction. The Conference Report on the Act states that "Section 30 provides generally that matters pertaining to the government of the Virgin Islands, *except for the judiciary*, shall be placed under the jurisdiction of the Secretary of the Interior." H.R. Conf. Rep. No. 2105, 83d Cong., 2d Sess. 22 (1954) (emphasis supplied). The Senate Report contains identical language. S. Rep. No. 1271, *supra*, at 12. The Reports speak broadly of exempting

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good reason. The last referenced audit by the comptroller general was alleged to have taken place in 1976, before the Territorial Court was even created. *See* Affidavit of Neal H. Littlefield, ¶ 10, Cir. Ct. App. A-352. In addition, the government comptroller's statutory authority extended only to "departments, agencies or establishment[s]" of the government, *see* App. 31a n.9, not the judicial branch. Practice cannot create authority Congress has not conferred, and the actions of a predecessor entity with respect to a predecessor court can provide little illumination of the issues before the Court.

"the judiciary" from Interior's jurisdiction, with no indication whatever of any limit on the exemption.

Under the decision below, only the District Court of the Virgin Islands is insulated from Interior. If that had been Congress's intent, it would have been easy enough for it to say "except matters relating to the District Court." It did not do so. Instead, it excluded "matters relating to *the judicial branch* of said government which on July 22, 1954 are under the supervision of the Director of the Administrative Office of the United States Courts * * *." 48 U.S.C. § 1544 (emphasis supplied). There is no dispute that "the judicial branch" includes the Territorial Court. Pursuant to Section 21 of the Revised Organic Act, 48 U.S.C. § 1611, "[t]he judicial power of the Virgin Islands shall be vested in a court of record designated the 'District Court of the Virgin Islands' established by Congress, and in such appellate court and lower local courts as may have been or may hereafter be established by local law." The Territorial Court was established, pursuant to this grant of authority, by local law. Together with the District Court, it comprises the judicial branch of the Virgin Islands.

The court below ruled that the Territorial Court was nevertheless not exempt from Interior's jurisdiction because Section 30 excludes only matters relating to the judicial branch "which on July 22, 1954 are under the supervision of the Director of the Administrative Office of the United States Courts." According to the Third Circuit, the law in effect in 1954 expressly authorized the AO to audit the District Court but not the Territorial Court, and thus matters relating to the Territorial Court were fair game for transfer to Interior. App. 7a.

There is no explanation in the legislative history of the "which" clause. As noted, the legislative history states broadly that the Section was designed to except "the judiciary" *simpliciter*. H. R. Conf. Rep. No. 2105,

supra, at 22; S. Rep. No. 1271, *supra*, at 12. The statutory language accomplishes this result if the "which" clause is read as descriptive rather than limiting, as an explanation of *why* the judicial branch was being exempted from Interior's authority rather than a restriction on the extent to which it *was* exempted. This is in fact the grammatically correct reading of the language enacted by Congress. "Which"—the pronoun used in Section 30—is the nonrestrictive pronoun; "that" is the restrictive pronoun.[13] If Congress had intended to exclude only *certain* "matters relating to the judicial branch," it would have properly used the restrictive pronoun "that." Thus, the use of "which" in Section 30 indicates that Congress was explaining and not restricting the exclusion of "matters relating to the judicial branch." Those matters—all of them—were excluded because they were considered by Congress to be under the supervision of the AO.

While we would not be so bold as to suggest that Congress always follows the rules of grammar, the grammatically correct reading is in this case the only one that makes sense. The Government's theory would "freeze" the allocation of authority between Interior and the AO over matters relating to the judicial branch as of 1954. Thus, a new judgeship added to the District Court—as occurred in 1970—would theoretically be under Interior, because it was not under the AO in 1954. Computer systems—not audited by the AO in 1954—could, under the Government's theory, now be audited by Interior. New programs initiated by the District Court after 1954 would all be within Interior's jurisdiction. That is not,

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[13] *See* W. Strunk, Jr. & E. B. White, *The Elements of Style*, (3d ed. 1979), at 59 ("*That* is the defining, or restrictive pronoun, *which* the nondefining, or nonrestrictive") (emphasis in original); R. Weisberg, *When Lawyers Write* (1987), at 131 (" 'that' begins a restrictive clause * * *. 'Which,' on the other hand, introduces a nonrestrictive clause; it adds extra information—one of several possible attributes of the antecedent * * *").

of course, what Congress intended when it excluded the judicial branch from Interior's sway. The "which" clause was not limiting but descriptive, and all "matters relating to the judicial branch" were insulated from Interior's jurisdiction.

This interpretation is confirmed by considering the remainder of Section 30. Section 30 excepts from Interior's authority not only "matters relating to the judicial branch," but also "matters relating to the United States Attorney and the United States Marshal which on July 22, 1954 are under the supervision of the Attorney General." 48 U.S.C. § 1544. The grammatical structure is the same as in the clause concerning the judicial branch. Yet surely there is no question that Congress did not intend to restrict the exception to those U.S. Attorney and U.S. Marshal matters that the Attorney General supervised as of 1954. It would be absurd to ascribe to Congress an intent that the U.S. Attorney and U.S. Marshal fall under the authority of the Secretary of the Interior with respect to duties added after 1954, and we would be surprised to see the Department of Justice advocating such a position. Clearly *all* matters relating to the U.S. Attorney and U.S. Marshal are excepted from Interior's jurisdiction, because—as Congress tells us in the statute—those are matters under the supervision of the Attorney General. This same interpretation—the grammatically correct one—must also apply to the judicial branch exception.

The Third Circuit's interpretation not only is contrary to the structure of the statute, its grammatically correct reading, and its legislative history, but also leads to absurd results. *See American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 71 (1982) ("Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible"). Under the decision below, the District Court is audited by the AO, and the Territorial Court is to be audited by Interior. Yet the District Court and the Territorial Court together form the one

judicial branch of the Virgin Islands, with overlapping jurisdiction, funding, personnel, and bar. In many senses the two courts cannot be separated, and there is no basis for inferring a congressional intent to undertake such an exercise.

It is critical to recognize that the "District Court of the Virgin Islands" is not a United States District Court for the Virgin Islands. *See* 48 U.S.C. § 1611(a); *cf. Territory of Guam* v. *Olsen*, 431 U.S. 195, 196 n.1 (1977). The District Court traces its ancestry to 1921 ordinances which simultaneously created the Police Courts, predecessors to the Territorial Court.[14] As the Third Circuit noted on a prior occasion:

> [T]he present District Court of the Virgin Islands is the direct successor to the district court which was created for the Virgin Islands by the municipal ordinances of 1921. It is, as the Revised Organic Act plainly indicates, the repository of the judicial power of the Virgin Islands with general original jurisdiction in all but certain minor causes. It is thus clear that *it is a territorial court*, indeed, the chief court of the territory. [*Id.* (emphasis supplied).]

Yet the decision below ascribes to Congress an intent to insulate *this* "territorial court" from the authority of Interior, while not similarly excluding the Territorial Court itself.

The Revised Organic Act "vests the judicial power of the Virgin Islands in the District Court of the Virgin Islands and in inferior courts created by local law." S. Rep. No. 1271, *supra*, at 11. The District Court serves

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[14] The ordinances—one covering St. Croix and the other St. Thomas and St. John—provided that "[t]he Judicial power of the Virgin Islands of the United States is hereby declared to be vested in a District Court, Police Courts and Juvenile Courts and a District Court Commissioner." *See United States* v. *George*, 625 F.2d 1081, 1088 (3d Cir. 1980).

as the appellate court for cases brought in the Territorial Court. 48 U.S.C. § 1613a(a); 4 V.I.C. § 33. Territorial Court judges are regularly designated to sit as District Court judges, and to serve on panels of the Appellate Division of the District Court.[15] Cases may be transferred between the Territorial Court and the District Court "in the interest of justice." 4 V.I.C. §§ 32, 77. Territorial funds are appropriated in the Territorial Court's budget for use by the District Court, including funds for the judicial council, law clerks' salaries, and other District Court needs.[16] District Court and Territorial Court judges serve together on the Judicial Council of the Virgin Islands,[17] and there is one bar for both courts. *Thorstenn* v. *Barnard*, 842 F.2d 1393, 1401 (3d Cir.) (en banc) (Higginbotham, J., dissenting), *cert. granted*, 108 S.Ct. 2895 (1988). The notion that Congress intended to divide auditing responsibility for the two courts in separate branches, and go to the trouble to protect the District Court from executive branch scrutiny but not the intertwined Territorial Court, is plainly untenable. Indeed, it is difficult to see how such separate audits could even be conducted: is the Interior auditor permitted to evaluate a Territorial Court judge's use of facilities and personnel in connection with cases before the Territorial Court, but *not* that same judge's use of the same facilities and personnel for cases he is responsible for in the District Court?

The court below relied heavily on the fact that 28 U.S.C. § 610 expressly extends the jurisdiction of the AO to the District Court, but does not expressly mention the Territorial Court. App. 7a. As noted, since the clause

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[15] 48 U.S.C. §§ 1613a(a)(b), 1614; Affidavit of Presiding Judge Verne A. Hodge, ¶¶ 39, 40, Cir. Ct. App. A-268.

[16] Affidavit of Presiding Judge Verne A. Hodge, ¶ 36, Cir. Ct. App. A-268.

[17] *Id.* ¶ 37, Cir. Ct. App. A-268. *See* 4 V.I.C. § 211.

referring to the AO is not a restrictive clause, it does not limit the exception from Interior authority of "matters relating to the judicial branch." *See supra* at 11-14. In any event, it seems evident that Congress's reference to the District Court in 28 U.S.C. § 610 was intended to encompass the Virgin Islands judiciary, or at least it was so understood by Congress when it passed the Revised Organic Act in 1954.[18] In enacting Section 30 of that Act, Congress assumed that the AO had broader jurisdiction, since it otherwise would not have referred to matters relating to the "judicial branch" supervised by the AO, but simply to matters relating to the District Court. It chose the more inclusive words "judicial branch," which expressly include courts established by local law. *See* 48 U.S.C. § 1611.[19]

The reasons that Congress established the AO are directly pertinent to the facts of this case. Congress created

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[18] The District Court of the Virgin Islands was expressly named in 28 U.S.C. § 610 in 1939. The fact that Congress referred in Section 30 of the Revised Organic Act to matters under the AO on the date of approval of that Act (July 22, 1954)—rather than matters placed under the AO in 1939, or matters under the AO *prior to* approval of the Revised Act—strongly suggests an intent to link the exception for "the judicial branch" in Section 30 with the definition of the judiciary in the Revised Act itself, in Section 21, 48 U.S.C. § 1611. In other words, the Section 30 exception extends not simply to matters previously supervised by the AO, but to matters relating to the judicial branch which are under the supervision of the AO when this Act—the one that defines the judicial branch to include local courts such as the Territorial Court—becomes effective.

[19] In a letter to the Third Circuit on February 26, 1988, the AO noted that it was "not aware of any legal authority" according it an audit role with respect to the Territorial Court. The letter acknowledged, however, that "the Administrative Office does not pretend to offer any particular expertise in the interpretation of the Revised Organic Act of 1954 * * *." In any event, authority conferred by Congress is not lost by lack of exercise. *FTC* v. *Bunte Bros. Inc.*, 312 U.S. 349, 352 (1941).

the AO to "accomplish the definite separation of the judicial branch of the Government from fiscal and administrative control by the executive branch * * *. The bill places the responsibility for judicial administration where it belongs—with the judiciary * * *." H.R. Rep. No. 702, 76th Cong., 1st Sess. 3-4 (1939). As noted in the Senate Report, establishment of the AO would effect " 'the separation of the Department of Justice from immediate and actual and intimate participation in the monetary affairs of the courts * * *.' " [20]

Thus, Congress recognized the danger to separation of powers principles posed by executive branch scrutiny of the "monetary affairs" of the judiciary. Those dangers are acutely presented in this case. Under the decision below there are *no* limits—statutory or constitutional—on Interior's power to probe the internal workings of the Territorial Court. Audits could be initiated in response to decisions by the Territorial Court adverse to Interior or to Interior's interests in the Virgin Islands. Executive branch officials could descend upon the Territorial Court—armed with subpoenas—when that court is considering sensitive cases of interest to those officials. Executive auditors unhappy with the Territorial Court could recommend reductions in law clerks and other court personnel, equipment, or facilities, directly affecting the ability of the court to perform judicial functions. The audit plan covering this very case—sent by the Inspector General to the Secretary of the Interior—emphasized that

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[20] S. Rep. No. 426, 76th Cong., 1st Sess. 3 (1939) (quoting analysis of Chief Justice Groner). *See also* H.R. Rep. No. 702, *supra*, at 4 (" 'The bill gives as complete assurance as we can give of buttressing judicial independence, and there is no way to fortify judicial independence equal to that of enabling the judges to perform their work under judicial supervision. There are countless ways of weakening judicial independence; fortunately, we have now found the most effective way of reinforcing independence in the essential judicial functions' ") (quoting American Judicature Society statement).

the audit approach would be one "particularly emphasizing revenue collection activities." [21] Such a focus—a not unnatural one for the executive, concerned with revenue—puts untoward pressure on the court to, for example, increase assessment of fines in criminal cases.

Operational audits of the sort at issue here place an extraordinary amount of discretion in the hands of auditors. One standard guide, for example, points out that since there is some degree of inefficiency or ineffectiveness found in every audit, the auditor must decide whether an isolated occurrence should be overlooked or is a matter of concern, and whether other occurrences are serious because they are common and widespread.[22] Standards must be developed against which performance is measured, and these standards can be gathered not only from laws, regulations and contracts but from industry statistics and practices and even from current peer group performance and historical precedents.[23] In the context of this case, Interior's auditors could compare the Territorial Court's performance with that of the District Court, while the AO is making no such comparison, or could choose a number of other standards which would not be considered appropriate by auditors experienced in performing legal audits.

Precisely these sorts of concerns led Congress to remove audit responsibilities from the executive and place them in a judicial branch agency, the AO. The same concerns led to the insulation of "matters relating to the judicial branch" from Interior authority in Section 30 of the Revised Organic Act, and the same concerns support construing "government" in Section 17 of the Act as not encompassing the judicial branch. These provisions, read

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[21] Audit Workplan FY 1986 (Sept. 10, 1985), Cir. Ct. App. A-362.

[22] Price Waterhouse Guide to Accounting Controls (1985-1986 Supplement), at 75.

[23] *Id.* at 76-82.

together in light of their legislative history, confirm that Congress did not intend to and in fact did not authorize an executive branch agency to audit the Territorial Court.

II. The Statutory Construction Adopted Below Is Inconsistent With The Separation Of Powers

This Court has frequently reiterated that federal statutes are to be interpreted to avoid constitutional issues, if such a construction is "fairly possible." *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932).[24] The court below did not adhere to this basic tenet, instead embracing an interpretation of the Revised Organic Act permitting an executive branch agency to probe the workings of the judiciary, contrary to the separation of powers.[25]

Not all constitutional protections apply in the unincorporated territories. Since the celebrated *Insular Cases*,[26] this Court has been engaged in deciding which constitutional guarantees and limitations follow the Flag, and which do not. It is clear, however, that "Congress may

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[24] *See, e.g., CFTC* v. *Schor*, 106 S.Ct. 3245, 3252 (1986); *United States* v. *Clark*, 445 U.S. 23, 27 (1980); *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 500-501 (1979).

[25] The Government argued below that separation of powers concerns were misplaced because the Territorial Court—and the District Court, for that matter—are not Article III courts. Concerns for judicial independence, however, are not limited to Article III courts. *See, e.g., Mundy* v. *Weinberger*, 554 F. Supp. 811, 824 (D.D.C. 1982) ("Although the Court of Military Appeals is an Article I court, not one established under Article III, it is a body created by Congress to perform inherently judicial functions. Executive encroachment on the judicial power is to be no more permitted when that power is being exercised by an Article I tribunal than by one created under Artice III"). Indeed, the very fact that judges of the judicial branch of the Virgin Islands do not enjoy all the safeguards of Article III counsels strongly in favor of vigilance to protect them against executive branch encroachments, because they are more vulnerable.

[26] *Supra* note 6.

make constitutional provisions applicable to territories in which they would not otherwise be controlling," *Torres* v. *Puerto Rico*, 442 U.S. 465, 470 (1979), and Congress has chosen to apply the doctrine of separation of powers to the Virgin Islands. One example, of course, is Section 30 itself, insulating "matters relating to the judicial branch" from Interior's executive branch authority. 48 U.S.C. § 1544. The Revised Organic Act as a whole sets up separate and distinct executive, legislative, and judicial branches, confirming the application of separation of powers.[27] When Congress authorized Virgin Islanders to adopt their own constitution, it specified that any such constitution shall "provide for a republican form of government, consisting of three branches: executive, legislative and judicial." Pub. L. 94-584, 90 Stat. 2899, § 2(b)(2).

As was held in the immediate wake of the first Organic Act:

> There is no reason to believe that Congress did not intend to place the principle of the separation of powers into the legal system enacted for the Virgin Islands. Only an express and unmistakable statement of Congress that our historical tradition should be departed from can lead us to believe that the American doctrine of the separation of powers of government is not in force and effect in the Virgin Islands. [*People* v. *Francis*, 1 V.I. 359, 366 (D.V.I. 1936).]

This Court squarely applied the separation of powers to a territory in *Springer* v. *Government of the Philippine Islands*, *supra*. There, the Court held that the Philippines legislature violated the separation of powers when it purported to appoint certain legislative officials as directors of a corporation owned by the Philippine Islands. The

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[27] *See, e.g., Smith* v. *Government of Virgin Islands*, 375 F.2d 714, 719 (3d Cir. 1967); *Virgo Corp.* v. *Paiewonsky*, 384 F.2d 569, 576 (3d Cir. 1967), *cert. denied*, 390 U.S. 1041 (1968).

Court emphasized that the Philippine Organic Act "divides the government into three separate departments—the legislative, executive, and judicial" and that "this separation and the consequent exclusive character of the powers conferred upon each of the three departments is basic and vital—not merely a matter of government mechanism." 277 U.S. at 201. The Court struck down the vesting of executive powers in legislative officials as contrary to the "general rule inherent in the American constitutional system" that no branch can exercise the powers of the other two. *Id.* In *Municipality of St. Thomas & St. John* v. *Gordon*, 78 F. Supp. 440, 444 (D.V.I. 1948), the court applied *Springer* to the Virgin Islands, noting that the Philippine and Virgin Islands Organic Acts "are identical in providing the three separate departments of government." The court concluded that *Springer* confirmed that the separation of powers applied to the Virgin Islands. *Id.*

Even in the absence of Congress's manifest intent, the separation of powers would still apply.[28] The constitutional protections that follow the Flag include "such prohibitions as go to the very root of the power of Congress to act at all," *Downes* v. *Bidwell*, 182 U.S. at 277—"the 'essentials' of the Constitution." *Sakamoto* v. *Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1287 (9th Cir. 1985), *cert. denied*, 475 U.S. 1081 (1986). The Framers and this Court have described the separation of powers in just such terms. Madison stated that "[n]o political truth is certainly of greater intrinsic value, or is stamped

[28] Last Term this Court was confronted with the question of whether the Commerce Clause applied in the Virgin Islands, even though Congress had not expressly provided that it should apply. In *JDS Realty Corp.* v. *Government of the Virgin Islands*, 824 F.2d 256, 260 (3d Cir. 1987), the Third Circuit had held that the Clause did apply. This Court granted certiorari and remanded for consideration of mootness. 108 S. Ct. 687 (1988). As noted, the Government agrees in this case that there is no issue of mootness. *See supra* n.5.

with the authority of more enlightened patrons of liberty," [29] and this Court has recognized that "[t]he men who met in Philadelphia in the summer of 1787 * * * viewed the principle of separation of powers as a vital check against tyranny." [30]

The Third Circuit was willing to assume that the separation of powers applied within the Virgin Islands, but ruled that the doctrine did not constrain the U.S. Congress in exercising its power to legislate for the territories under Art. IV, § 3, cl. 2. App. 8a. The only authority cited by the court was a dissenting opinion that is not on point. App. 8a.[31] The Third Circuit's ruling represents a wholly unprecedented approach to the difficult question of applying the Constitution to the territories. Counsel is aware of no case—until the decision below—ruling that a constitutional protection *has* followed the Flag, but *not* if the protection is invoked against the Federal Government.

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[29] Federalist No. 47, at 301 (C. Rossiter ed. 1961).

[30] *Buckley* v. *Valeo*, 424 U.S. 1, 121 (1976). *See Bowsher* v. *Synar*, 106 S. Ct. 3181, 3186 (1986) ("The declared purpose of separating and dividing the powers of government, of course, was to 'diffus[e] power the better to secure liberty' ") (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)); *Morrison* v. *Olson*, 108 S. Ct. 2597, 2620 (1988) ("Time and again we have reaffirmed the importance in our constitutional scheme of the separation of governmental powers into the three coordinate branches"); *id.* at 2622 ("The framers * * * viewed the principle of separation of powers as the absolutely central guarantee of a just government") (Scalia, J., dissenting).

[31] In the cited portion of his dissent in *Territory of Guam* v. *Olsen*, 431 U.S. at 205, Justice Marshall stated hypothetically that "I do not doubt that Congress has the authority in the exercise of its plenary power over Territories of the United States, Art. IV, § 3, to reverse Guam's decision to reorganize its local court system." The hypothetical posed by Justice Marshall in no way implicates the separation of powers, since it involved the federal *legislature* overturning a decision of the Guamanian *legislature*; there was no conflict among branches.

Constitutional protections may or may not apply in the territories, but if they do, they do not mean one thing in the territories and something else stateside. If the separation of powers applies to the Virgin Islands, then it applies with full force. The doctrine of the *Insular Cases* may have been a license to pick and choose among constitutional protections; it never before has been understood to be a grant of authority to redesign those protections and apply them differently in the territories than in the States. This new and unsettling approach to constitutional protections in the territories should be reviewed and rejected by this Court.[32]

III. At The Very Least, The Court Should Hold This Petition Pending Decision Of No. 87-1939, *Barnard* v. *Thorstenn*, And No. 87-2008, *Virgin Island Bar Ass'n* v. *Thorstenn*

On June 30, 1988, this Court granted the petitions for certiorari in No. 87-1939, *Barnard* v. *Thorstenn*, and in No. 87-2008, *Virgin Islands Bar Ass'n* v. *Thorstenn*, consolidating the two cases. 108 S. Ct. 2895 (1988). The grants of certiorari bring before this Court the en banc decision of the Third Circuit, in which that court held invalid the residency requirement for admission to the Virgin Islands Bar. 842 F.2d 1393 (3d Cir. 1988). The majority determined that this Court's recent decision in *Frazier* v. *Heebe*, 107 S. Ct. 2607 (1987), striking down on the basis of the supervisory power the residency and

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[32] The Government argued below that, even if applicable, the separation of powers did not preclude an executive branch audit of the Territorial Court. The authority cited by the Government, however, involved issues of judicial immunity from any criminal investigation—not questions of allocation of audit responsibility—and such cases are clearly far removed from this case. The court below did not rely on this argument, finding the separation of powers wholly inapplicable. In any event, Congress has indicated that it considers the sort of intrusion contemplated here as a threat to judicial independence. *See supra* at 17-19.

local office requirements of the United States District Court for the Eastern District of Louisiana, was fully applicable to the similar requirements of the Virgin Islands Bar. 842 F.2d at 1397.

Judge Higginbotham, joined by four others, dissented. The dissenters noted that the bar admission rules struck down by the majority applied not only to the District Court of the Virgin Islands but to the Territorial Court as well, and that "the impact of today's decision will be felt not only by the Virgin Islands district court in the administration of those cases arising under federal laws, but also by the territorial courts." *Id.* at 1402. In addition, the dissenters noted that the District Court itself served as an appellate court for cases from the Territorial Court, and that in doing so the District Court was "more akin to a territorial rather than to a federal appellate tribunal." *Id.* For these reasons—focusing on the nature of the Virgin Islands judicial branch, and relations between the District Court and the Territorial Court—the dissent contended that the exercise of the supervisory power, as in *Frazier*, was inappropriate. The petitioners before this Court in Nos. 87-1939 and 87-2008 understandably reiterated these arguments, and the Court granted their petitions.

It is likely, therefore, that this Court's disposition of Nos. 87-1939 and 87-2008 will consider the relationship between the District Court of the Virgin Islands and the Territorial Court. As discussed above, that relationship is also directly pertinent to this case. The decision below establishes a system of different auditors for the District Court and the Territorial Court, a curious result given the interlocking relationship between the courts and the fact that—together—they form the one judicial branch of the Virgin Islands. Since this Court's decision in Nos. 87-1939 and 87-2008 will shed considerable light on this issue, the Court should—if it is not prepared to grant

the writ at this time—hold this petition and return to it after its decision in Nos. 87-1939 and 87-2008.

* * * *

From the beginning, Congress has been sensitive to the need to preserve judicial independence. In 1802 John Rutledge, Jr., on the floor of the House, described the significance of the principle:

> The Government may be administered with indiscretion and with violence; offices may be bestowed exclusively upon those who have no other merit than that of carrying votes at elections; the commerce of our country may be depressed by nonsensical theories, and public credit may suffer from bad intentions; but, so long as we may have an independent Judiciary, the great interests of the people will be safe. * * * Leave to the people an independent Judiciary, and they will prove that man is capable of governing himself * * *. [11 *Annals of Congress* 739-740 (1802).]

If this case concerned a state court there would, of course, be no question that a federal executive branch agency like Interior could not intrude. On the other hand, if the court at issue had been organized by Congress, Congress would have taken care at that time to insulate it from executive branch intrusion by expressly enumerating it in 28 U.S.C. § 610—as Congress repeatedly has done for courts it organized under Article III *and* Articles I and IV. The Territorial Court partakes of characteristics of both a federal and state court. It was established pursuant to a grant of authority from Congress, 48 U.S.C. § 1611, but organized under local law. 4 V.I.C. § 2. Its hybrid character should not deprive it of all protection from federal executive intrusion. Indeed, Congress took care to seal the loophole by enacting Section 30 of the Revised Organic Act, excepting the judicial branch—not just the District Court—from Interior's authority.

In failing to give effect to Congress's intent, the court below undermined the independence of a sister court. This Court should grant the writ to confirm that the significance of judicial independence does not stop at the water's edge.

CONCLUSION

For the foregoing reasons, this Court should grant the writ and reverse the decision below.

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APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-3720

TERRITORIAL COURT OF THE VIRGIN ISLANDS,
Appellant,

v.

JAMES R. RICHARDS, in his capacity as INSPECTOR GENERAL, OFFICE OF INSPECTOR GENERAL, U.S. DEPARTMENT OF INTERIOR, and NEAL LITTLEFIELD, in his capacity as REGIONAL AUDIT MANAGER, CARIBBEAN REGION, ST. THOMAS, V.I., OFFICE OF INSPECTOR GENERAL, U.S. DEPARTMENT OF INTERIOR

Appeal from the District Court of the Virgin Islands
Division of St. Thomas and St. John

D.C. Civil No. 87-0024

Argued March 1, 1988

BEFORE: SEITZ, HIGGINBOTHAM and
COWEN, *Circuit Judges.*

Filed: May 27, 1988

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OPINION OF THE COURT

SEITZ, *Circuit Judge.*

I. JURISDICTION AND SCOPE OF REVIEW

This appeal requires us to determine whether the Department of the Interior is authorized by Congress to audit the Territorial Court of the Virgin Islands.

The District Court of the Virgin Islands had jurisdiction under 28 U.S.C. § 1331 (1982); 48 U.S.C. § 1612(a) (1982). We have jurisdiction pursuant to 28 U.S.C. § 1291 (1982).

II. FACTS AND STATEMENT OF THE CASE

The Territorial Court was notified by the Inspector General and Regional Audit Manager of the United States Department of the Interior (together "the Department of the Interior") that the Territorial Court was scheduled for a direct audit by the Department of the Interior. In response, officials of the Territorial Court met with several auditors of the Department of the Interior. The court officials expressed concerns about the audit and criticized some of the alleged activities of the Department of the Interior in prior indirect audits. The parties were unable to resolve their differences.

Subsequently, the Territorial Court brought an action in the district court against the Department of the Interior seeking a declaratory judgment that the Revised Organic Act of 1954, as amended ("Organic Act"), vests the authority to audit the Territorial Court in the Administrative Office of the United States Courts ("AO") and *not* in the Inspector General of the Department of the Interior. The Territorial Court also sought injunctive relief relating to the proposed audit.

The same day that the complaint was filed, the Department of the Interior served a subpoena *duces tecum*

for specified financial documents on the Clerk of the Territorial Court. The Territorial Court filed a motion to quash, stay enforcement of and/or limit the scope of the subpoena and a motion to consolidate and for a protective order. While the motions were pending, the parties entered into a stipulation, which stated in part:

> plaintiff will not be required to turn over any documents sought by the subpoena issued by the Inspector General of the Department of Interior until the District Court of the Virgin Islands has rendered its final decision in the above-entitled case. However, it is understood that in order to properly join the issues in the above-entitled case, defendants may file appropriate pleadings seeking enforcement of said subpoena.
>
> Finally, it is stipulated that all proceedings relating to Plaintiff's Motion to Quash and Defendants' motion to enforce the subpoena if applicable be joined with Plaintiff's declaratory judgment action, previously filed and that all pleadings be filed in accordance with the time requirements in the declaratory judgment action.

After filing an answer, which included a counterclaim seeking enforcement of the subpoena, the Department of the Interior filed a motion for summary enforcement of the subpoena.

Following a hearing, the district court found that there was no constitutional impediment to enforcement of the subpoena and that nothing in the Organic Act or the Insular Areas Act of 1982 ("1982 Act") precluded the proposed aduit. Indeed, the district court found ample statutory authority for the proposed audit. Furthermore, after stating that it was not alleged that the subpoena was overbroad, burdensome or that it sought irrelevant material, the district court concluded that summary en-

forcement of the subpoena was appropriate. Accordingly, the district court granted the Department of the Interior's motion for summary enforcement. Additionally, it dismissed the Territorial Court's complaint with prejudice for lack of jurisdiction.

On appeal the Territorial Court asks that we: 1) reverse the district court's grant of summary enforcement; 2) reverse the district court's order dismissing with prejudice the Territorial Court's complaint for declaratory judgment and injunctive relief; 3) direct the district court to permanently enjoin the Department of the Interior from exercising any audit authority over the Territorial Court; 4) vacate the district court's denial of the Territorial Court's motion for sanctions; and 5) indemnify the Territorial Court for its costs, including attorney's fees.

III. DISCUSSION

Our standard of review of the district court's legal rulings is plenary. *E.g., Creque v. Lewis*, 803 F.2d 92, 93 (3d Cir. 1986). The district court's denial of discovery is reviewable for abuse of discretion. *Arnold Pontiac-GMC, Inc. v. General Motors Corp.*, 786 F.2d 564, 568 (3d Cir. 1986).

A. *Statutory Authority and Separation of Powers*

The Territorial Court, created by the Territorial legislature, pursuant to power granted by the Organic Act, contends on several legal bases that the district court erred in ruling that the Department of the Interior, an executive agency of the United States, instead of the AO, a judicial agency, has authority to audit its record. We turn to the pertinent statutory history.

The Revised Organic Act passed by Congress in 1954 ("1954 Act") created the office of government comptroller to "audit and settle all accounts and claims pertain-

ing to the revenue and receipts from whatever source of the government of the Virgin Islands," and to "audit and settle . . . all expenditures of funds and property pertaining to the government of the Virgin Islands." Organic Act of 1954 § 17(b). In 1982 Congress transferred certain enumerated "functions, powers, and duties [previously] vested in the government comptroller for the Virgin Islands . . . [to] the Inspector General, Department of the Interior." 48 U.S.C. § 1599 (1982). Included in this transfer was the auditing authority to audit "all activities of the government of the Virgin Islands" that had previously resided with the government comptroller. *Id.*

The Territorial Court argues that reliance on section 17 is inappropriate because the phrase "all activities of the government of the Virgin Islands," should be construed to mean the activities of *only* the executive branch of the government. We find no merit in this argument because of the breadth of the language employed in the statute and the lack of any valid reason why Congress would want to exclude the other two branches of the territorial government from its auditing supervision.

The Territorial Court next asserts that the district court erred in ruling that an executive agency instead of a judicial agency, has authority to audit the Territorial Court. Its position is bottomed on the contention that § 30 of the Organic Act places its judicial branch "within the jurisdiction of" the AO and "excludes the judicial branch from the jurisdiction of the Department of Interior." In effect, the Territorial Court is asserting that the general language of § 17 when read with § 30 shows a congressional intent to carve out an exception to the generality of § 17 by placing the auditing function over the Territorial Court in the AO. From this premise, the Territorial Court argues that only the AO has audit authority over the Territorial Court.

Section 30, also enacted in 1954, states in pertinent part that

> [a]ll reports required by law to be made by the Governor to any official of the United States shall hereafter be made to the Secretary of the Interior, and the President is hereby authorized to place all matters pertaining to the government of the Virgin Islands under the jurisdiction of the Secretary of the Interior, *except matters relating to the judicial branch of said government which on the date of approval of this Act [July 22, 1954] are under the supervision of the Director of the Administrative Office of the United States Courts.*

(emphasis added).

The Territorial Court relies on the emphasized language to suggest that the totality of the Territorial Court system was thereby brought under AO supervision, at least as to the auditing function.

The scope of the authority possessed by the AO is defined by Title 28. Unlike the express authority given the AO to audit the District Court of the Virgin Islands, the relevant provisions of Title 28 in effect in 1954 did not grant the AO authority to audit the Territorial Court or its predecessor local courts. *See* 28 U.S.C. §§ 604(a)(11), 610 (1982); *see also* 1951 U.S. Code Cong. Serv. 738. Consequently, such power remained where the district court said it was, in the Department of the Interior.

The Territorial Court next contends that, if the relevant statutes confer authority on the Department of the Interior to audit the Territorial Court, such a conferral of authority is unconstitutional, as it violates separation of powers principles, and the due process and equal protection rights of the people of the Virgin Islands. The Territorial Court points out that the Department of the Interior is an executive agency, while the Territorial

Court is a judicial body. Permitting an executive agency to audit this judicial body, asserts the Territorial Court, would violate the constitutional principle that the legislative, executive, and judicial branches are independent and co-equal branches of the government.

Assuming, without deciding, that separation of powers principles may be viable as among the branches of the territorial government, we are convinced that the doctrine is inapplicable in resolving an attack made on an Act of Congress dealing with the Virgin Islands. We are unwilling to find such a constraint on Congress in its relations with the territories of the United States.[1] U.S. CONST. art IV, § 3, cl.2 (Congress is authorized to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States"); *see also Guam v. Olsen*, 431 U.S. 195, 205 (1976) (Marshall, J., dissenting).

In light of the foregoing discussion, we hold that the Department of the Interior had authority to audit the Territorial Court and authority to issue the subpoena. Inspector General Act of 1978, 5 U.S.C. App. § 6(a)(4) (1982).

B. *Appropriateness of Summary Enforcement Proceedings*

The Territorial Court asserts that the district court erred in enforcing the subpoena by way of summary proceedings. We have considered the arguments advanced by the Territorial Court, viz., that the motion for summary enforcement was a breach of the parties' stipulation and that summary enforcement was not available in

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[1] The Territorial Court also contends that the proposed audit would violate the due process and equal protection rights of the citizens of the Virgin Islands. These contentions are based on the incorrect premise that the district court's judgment violates separation of powers principles and are wholly meritless.

light of the constitutional challenge to the subpoena, and we find them unpersuasive. First, we agree with the district court that the motion was not a breach of the stipulation. Second, while the Territorial Court's argument is somewhat obscure, the reality is that they were afforded an opportunity to raise constitutional arguments in the summary enforcement proceedings, and the Territorial Court does not point to any indication that it was deprived of any right to which it was otherwise entitled. Accordingly, we hold that the district court possessed the power to order summary enforcement of the subpoena.

C. *The* Westinghouse *Factors*

Appellant next contends that, even if summary enforcement of the subpoena could have been granted, as we now hold, the district court erred in failing to consider all of the factors required to determine whether enforcement was appropriate.

Before granting enforcement of the present administrative subpoena, the district court was required to find that: 1) the Department of the Interior had the statutory authority to audit the Territorial Court; 2) the subpoena sought relevant information; and 3) the subpoena was not unduly burdensome. *United States v. Westinghouse Elec. Corp.*, 788 F.2d 164, 166 (3d Cir. 1986). Additionally, the subpoena must not be issued for an improper purpose. *Id.* at 166-67.

The issuing agency has the preliminary burden of showing that a subpoena satisfies the *Westinghouse* requirements. This burden was met by the affidavit accompanying the Department of the Interior's motion for summary enforcement.

Once the agency makes such a showing, as it did here, the burden shifts to the party opposing enforcement to rebut the agency's showing. The Territorial Court has

failed to point to any record evidence offered to rebut the preliminary showing.

We agree, however, that the Territorial Court did assert, contrary to the district court's statement, a challenge to the breadth and burdensomeness of the subpoena and to the good faith of the issuing agency. The defense was raised by the Territorial Court in its written response to the agency's enforcement motion. But this does not end the matter. The Territorial Court could not rest on its response once the agency made out its prima facie case for enforcement by way of affidavit. The Territorial Court was then required to make an appropriate showing in rebuttal. This it did not do. Thus, despite the district court's erroneous statement, we are satisfied that the Territorial Court did not create a factual issue with regard to breadth, burdensomeness or good faith that required the court to rule thereon. Accordingly, the agency's compliance with such factors can be inferred.

Additionally, the Territorial Court asserts that the district court erred in denying its request for discovery. We interpret this contention as suggesting that such action prevented it from rebutting the Department of the Interior's prima facie *Westinghouse* showing. The facts relating to the allegedly onerous and burdensome nature of the subpoena would be within the control of the Territorial Court rather than the Department of the Interior.

D. *Dismissal of the Complaint*

The Territorial Court asserts finally that the district court erred in dismissing with prejudice its action for declaratory judgment and injunctive relief.

We find this aspect of the appeal moot because the Territorial Court advanced the same arguments in its defense to summary enforcement of the subpoena that it raised in its complaint. Thus, even if we assume that the

district court erred in dismissing the complaint for lack of jurisdiction, we find that the judgment of the district court in enforcing the subpoena disposed of the proper subject matter of the complaint.[2]

E. *Motion for Sanctions*

The Territorial Court argues that the district court erred in denying its motion for sanctions against counsel for the Department of the Interior on grounds relating to impropriety in seeking summary enforcement. We find no abuse of discretion in the denial of the motion. *See Sun Ship v. Matson Navigation Co.*, 785 F.2d 59 (3d Cir. 1986).

IV. CONCLUSION

The order of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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[2] In finding the Territorial Court's appeal of the dismissal of its complaint moot, we do not address the hypothetical issue raised in its complaint that the Department of the Interior may engage in improper activities in future dealings with the Territorial Court. Such matters are for another day.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 87-3720

TERRITORIAL COURT OF THE VIRGIN ISLANDS,
Appellant

vs.

JAMES R. RICHARDS, IN HIS CAPACITY AS INSPECTOR GENERAL, OFFICE OF THE INSPECTOR GENERAL, U.S. DEPARTMENT OF INTERIOR, NEAL LITTLEFIELD, IN HIS CAPACITY AS REGIONAL AUDIT MANAGER, CARIBBEAN REGION, ST. THOMAS, V.I., OFFICE OF INSPECTOR GENERAL, U.S. DEPARTMENT OF INTERIOR

(D.C. Civil No. 87-0024)

On Appeal from the District Court of the Virgin Islands
Division of St. Thomas and St. John

Present: SEITZ, HIGGINBOTHAM and COWEN, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the District Court of the Virgin Islands, Division of St. Thomas and St. John and was argued by counsel March 1, 1988.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said

District Court entered October 21, 1987, be, and the same is hereby affirmed. Costs taxed against the appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Sally Mivos
Clerk

May 27, 1988

Certified as a true copy and issued in lieu of a formal mandate on July 1, 1988.

Test: /s/ M. Elizabeth Ferguson
Chief Deputy Clerk
U.S. Court of Appeals
for the Third Circuit

Costs taxed in favor
appellee as follows:

Brief and Appendix $71.00

APPENDIX C

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

Civil No. 1987/24

TERRITORIAL COURT OF THE VIRGIN ISLANDS,
Plaintiff,

vs.

JAMES R. RICHARDS, in his capacity as INSPECTOR GENERAL, OFFICE OF INSPECTOR GENERAL, U.S. DEPARTMENT OF INTERIOR,

and

NEAL LITTLEFIELD, in his capacity as REGIONAL AUDIT MANAGER, CARIBBEAN REGION, ST. THOMAS, V.I., OFFICE OF INSPECTOR GENERAL, U.S. DEPARTMENT OF INTERIOR,

Defendants.

[Filed Oct. 21, 1987]

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DAVID V. O'BRIEN, Judge

MEMORANDUM AND ORDER

The Territorial Court of the Virgin Islands seeks to prevent an audit of its operations by the Inspector General of the United States Department of the Interior. It cites the separation of powers doctrine as a constitutional limitation on any such intrusion into its affairs. It claims as well an absence of statutory authority allowing such an audit. We find no constitutional impairment, and that there is ample statutory permission to enforce

the Inspector General's subpoena directed to the Territorial Court.

I. FACTS

Neal H. Littlefield, the Caribbean regional audit manager for the Inspector General of the United States Department of Interior, recommended an audit of the Territorial Court of the Virgin Islands in the fall of 1985. He did so because his office had never directly audited the Territorial Court, and the predecessor office charged with similar duties had not audited the Court since 1976, when it was known as the Municipal Court of the Virgin Islands.[1]

After approval, Littlefield, by letter dated May 13, 1986, notified the Territorial Court's Presiding Judge, Hon. Verne A. Hodge, of this audit. An entrance conference was held on June 26, 1986, attended by members of Littlefield's staff and by Judge Hodge, among others.

The federal officials told Judge Hodge that the audit had three objectives. It would seek to determine whether funds received by the Territorial Court were accounted for; whether procurement practices were in compliance with Virgin Islands law; and whether the Territorial Court was achieving its program directives. This was to be accomplished by exploring the Territorial Court's

(a) revenues and cashier collection procedures;

(b) expenditures and procurement practices;

(c) recording and collection of receivables for Court fines;

(d) control over escrow accounts for bail funds;

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[1] The facts we recite are essentially derived from the affidavits of Neal H. Littlefield and Judge Verne A. Hodge respectively. We see no reason to strike portions of Littlefield's affidavit as requested by the Territorial Court.

(e) control over equipment and other assets;

(f) time and attendance and payroll procedures.

Although initially receptive to the audit's subject matter, Judge Hodge immediately voiced strong concerns regarding the reasons for the audit, the timing of the audit and the status of other indirect audits of the Territorial Court by the Inspector General's Office. Specifically, he was concerned with the propriety of the Inspector's involvement in various published articles in the *Virgin Islands Daily News* concerning these indirect audits. He also challenged two of the objectives of the audit.

These concerns were first expressed by phone to assistant Inspector General Harold Bloom on August 16, 1986. Subsequently, Judge Hodge wrote Bloom on September 16, 1986 requesting Bloom's confirmation as to the conditions under which Judge Hodge would permit the audit. In addition, Judge Hodge retained counsel for the Territorial Court who wrote Bloom on September 23, 1986 challenging the Inspector's authority to audit the Territorial Court.

Despite Bloom's and Littlefield's continued assurances in the fall of 1986 that the audit would be properly conducted, Judge Hodge was not satisfied and did not consent to the audit. As a result, Inspector General James R. Richards ("Inspector") issued a subpoena duces tecum ("subpoena") in November, 1986 directed to Viola Smith, Clerk of the Territorial Court. The subpoena was served in late January 1987. It required compliance by production of the relevant documents no later than February 2, 1987.

A) *Procedural Background*

Rather than comply or await a petition to enforce in this Court, the Territorial Court took the initiative and filed this action for declaratory and injunctive relief on

January 23, 1987. It then moved to quash the subpoena. However, by stipulation approved by this Court on March 4, 1987, the parties agreed that no documents were to be produced before resolution of the conflict by this Court. Further, they agreed that the Inspector would file the appropriate "pleadings" to enforce the subpoena and join such action with the Territorial Court's motion to quash. The Inspector did just that. Briefing and oral argument followed.

B) *Arguments*

In opposition to enforcement, the Territorial Court disputes a portion of the Insular Areas Act of 1982, 48 U.S.C.A. § 1599 (Supp. 1987), which grants the Inspector audit oversight of the government of the Virgin Islands. It argues that to the extent the statute is applied to allow the Inspector to audit the Territorial Court, it is unconstitutional as violative of the doctrine of separation of powers. The Territorial Court also cites 48 U.S.C.A. § 1544 in support of its constitutional argument. Relying on that provision for statutory support, it argues that Congress excepted the Territorial Court from the Inspector's jurisdiction, and placed the Territorial Court's supervision in the hands of the Administrative Office of the United States Courts ("Administrative Office").

Although not an argument against enforcement, the Territorial Court also asserts that if the Inspector is permitted to audit it, the Inspector will perform *ultra vires* acts similar to its behavior in earlier audits of territorial government affairs. It seeks discovery to substantiate these allegations, aiming to use such improprieties, if proved, as a further bar to an audit, and/or as a basis for an injunction limiting the audit.

At oral argument, counsel for the Territorial Court reiterated the plaintiff's reliance on its constitutional argument. However, he conceded that this defense was not asserted until, as he said, there developed a "meretri-

cious" relationship between the Inspector and the local press concerning the earlier indirect audits of the Territorial Court by the Inspector. Apparently, the Territorial Court was collaterally audited by the Inspector on several occasions between 1983 and 1986. These indirect audits occurred during the Inspector's direct audits of various departments of the executive branch of the Government of the Virgin Islands.

II. DISCUSSION

Congress specifically transferred audit oversight functions from the government comptroller for the Virgin Islands to the Inspector by virtue of the Insular Areas Act of 1982. *See* 48 U.S.C.A. § 1599 (Supp. 1987).[2]

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[2] That statute provides:

§ 1599. *Transfer of functions from government comptroller for the Virgin Islands to Inspector General Department of the Interior*

(a) Functions, powers and duties transferred

The following functions, powers and duties heretofore vested in the government comptroller for the Virgin Islands are hereby transferred to the Inspector General, Department of the Interior, for the purpose of establishing an organization which will maintain a satisfactory level of independent audit oversight of the government of the Virgin Islands:

(1) The authority to audit all accounts pertaining to the revenue and receipts of the government of the Virgin Islands, and of funds derived from bond issues, and the authority to audit, in accordance with law and administrative regulations, all expenditures of funds and property pertaining to the government of the Virgin Islands including those pertaining to trust funds held by the government of the Virgin Islands.

(2) The authority to report to the Secretary of the Interior and the Governor of the Virgin Islands all failures to collect amounts due the government, and expenditures of funds or uses of property which are irregular and not pursuant to law.

(b) Scope of authority transferred

The authority granted to paragraph (a) of this section shall extend to all activities of the government of the Virgin Islands, and

Pursuant to the Inspector General Act of 1978, the Inspector has subpoena power to carry out his duties. 5 U.S.C.A. App 3 § 6 (Supp. 1987). This power to subpoena, however, is not self executing. Rather, application must be made for a Court order enforcing compliance. 5 U.S.C.A. App at § 6(a)(4).[3]

A) *Jurisdiction*

A motion seeking enforcement of such a subpoena confers subject matter jurisdiction of the cause on this Court. Until enforcement is sought, there is not the immediate and irreparable injury of the type remedied by declaratory or injunctive relief as sought herein by plaintiff. *Belle Fourche Pipeline Co. v. United States*, 751 F.2d 332, 335 (10th Cir. 1984), *cert. denied*, —— U.S. ——, 106 S.Ct. 64 (1985) (citing *Reisman v. Caplin*, 375 U.S. 440 (1964)).

It was in *Reisman* that the Supreme Court strongly disfavored pre-enforcement review of investigative sub-

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shall be in addition to the authority conferred upon the Inspector General by the Inspector General Act of 1978 (92 Stat. 1101), as amended.

48 U.S.C.A. § 1599.

[3] The Inspector General Act provides in relevant part:

(a) In addition to the authority otherwise provided by this Act, each Inspector General, in carrying out the provisions of this Act is authorized—

. . .

(4) to require by subpoena the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence necessary in the performance of the functions assigned by this Act, which subpoena, in the case of contumacy or refusal to obey, shall be enforceable by order of any appropriate United States district Court: Provided, That procedures other than subpoenas shall be used by the Inspector General to obtain documents and information from Federal agencies;

. . .

5 U.S.C.A. App. at § 6(a)(4).

poenas. Challenges to enforcement are to be heard at the enforcement hearing. 375 U.S. at 449. Thus, in the case at bar, only the Inspector's counterclaim seeking enforcement and not plaintiff's complaint, provided us with subject matter jurisdiction. *Comet Electronics Inc. v. United States*, 381 F. Supp. 1233, 1237 (W.D. Mo. 1974), *aff'd mem*, 420 U.S. 999 (1975).

We make this distinction because the Territorial Court asserts that the Inspector breached the March 4, 1987 stipulation by moving for enforcement. It claims that the stipulation allowed the counterclaim for enforcement, but not the follow-up motion.

We recognize, however, that enforcement hearings are summary in nature. *E.E.O.C. v. Bay Shipbuilding Corp.*, 668 F.2d 304, 310 (7th Cir. 1981). We believe, therefore, that the Territorial Court's contention represents a misunderstanding respecting the meaning of the term "pleadings" as used in the stipulation. We did not read the stipulation at the time of our approval, nor do we now, as a waiver by the defendants of their right to seek prompt resolution of this conflict, and enforcement of the subpoena. Indeed, we would not approve a stipulation which could effectively delay resolution of this conflict, recognizing the summary nature of the proceeding. Thus, we turn to that question.

B) *Enforcement*

Three criteria must exist before an administrative subpoena will be enforced. It must be within the statutory authority of the agency, it must seek relevant information and it must not be unduly burdensome. *United States v. Westinghouse Elec. Corp.*, 788 F.2d 164, 166 (3d Cir. 1986) (citations omitted). The Third Circuit also requires that a subpoena not be issued for an improper purpose such as harrassment. *Id.* at 166-167 (citations omitted).

Normally a Court will accept as sufficient an agency's pleading that the matter under investigation is within its statutory coverage. *N.L.R.B. v. Interstate Dress Carriers, Inc.*, 610 F.2d 99, 111 (3d Cir. 1979). Only where appropriate is even a hearing or discovery required. *Id.* at 112 (citations omitted). If statutory authority exists, the information sought is relevant and not burdensome, and if the challenging party has not put the good faith of the agency squarely in issue, a district Court is to act summarily. *Cf., Interstate Dress Carriers, supra* at 112 (citations omitted).

Here the relevancy and scope of the subpoena are not factually challenged, nor is the agency's good faith contested. Rather, we face a constitutional and statutory challenge to the Inspector's authority, and an allegation that the audit should not be allowed since it will not proceed according to the Inspector's own rules and regulations. We address each *seriatim.*

1. *Separation of Powers*

Article IV, § 3 of the United States Constitution gives Congress the authority to make all needful rules and regulations respecting this territory. *Granville-Smith v. Granville-Smith*, 349 U.S. 1, 4 (1954) (striking down the then existing Virgin Islands divorce law as beyond the authority conferred by Congress upon the Territorial legislature). This authority has been described as plenary; *United States v. Canel*, 708 F.2d 894, 896 (3d Cir. 1983), *cert. denied*, 464 U.S. 852 (1983); complete, *United States v. Husband R. (Roach)*, 453 F.2d 1054 (5th Cir. 1971), *cert. denied*, 406 U.S. 935 (1972); and broad. *Examining Bd. v. Flores de Otero*, 426 U.S. 572, 586 n. 16 (1975) (citations omitted).

Pursuant to this grant of authority, Congress enacted the Organic Act of 1936 and the Revised Organic Act of 1954 as amended; 48 U.S.C. § 1541 *et seq.*, which declared

the Virgin Islands to be an unincorporated territory and created its basic charter of government. *See generally, Virgo Corp. v. Paiewonsky*, 384 F.2d 569, 576-578 (3d Cir. 1967), *cert. denied*, 392 U.S. 917 (1968). As was recognized in *Municipality of St. Thomas and St. John v. Gordon*, 78 F. Supp. 440, 443-444 (D.V.I. 1948), in so doing Congress established three separate departments of government for the Virgin Islands, that is, the executive, judicial, and legislative branches.

This system is, of course, in accord with the common American constitutional method of three separate co-ordinate and co-equal branches of government. *Id.; Luis v. Dennis*, 20 V.I. 373, 576 F. Supp. 733, 735 (D.V.I. 1983), *vacated*, 751 F.2d 604 (3d Cir. 1984). However, we make clear today that this system as applied to the Virgin Islands government is not of a constitutional nature because the local government does not exist by virtue of a constitution as does the federal government.[4] It exists only by virtue of the legislative grace of Congress.[5] *Canel*, 708 F.2d at 897. This may rankle we who live in the Virgin Islands, but it is a legal fact of life.

Of course, the doctrine of separation of powers is an inherent structural component of the United States Constitution, applied by the framers as they allocated the sovereign power of the people among the three co-equal branches of the federal government. *Nixon v. Adminis-*

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[4] Our reasoning in *Luis* is flawed to the extent it holds that the separation of powers doctrine as it relates to the three branches of the local government is of a constitutional nature. Thus, even if it were not vacated, we would not follow its reasoning here. Indeed, in its opinion vacating our *Luis* decision, the Circuit noted that the question of the Territorial legislature's infringement on the governor's appointment power is essentially whether the provisions of the Revised Organic Act have been violated.

[5] For example, prior to the Organic Act of 1936, Congress governed these islands through the auspices of the then Department of the Navy. *See* Act of Congress, March 3, 1917 ch. 171, 39 Stat. 1132 § 1.

trator of General Services, 433 U.S. 425, 443 (1976) [citing *United States v. Nixon*, 418 U.S. 683, 707 (1974) (adopting Justice Jackson's position in *Youngstown Steel & Tube v. Sawyer*, 343 U.S. 579, 635 (1952))]. But since the relationship between the Territorial Court and the Inspector as defined by Congress is not one between co-equal branches of the same government, the basic premise underlying the application of the principles of separation of powers is lacking.

Congress may have implicitly included separation of powers principles in creating the horizontal relationship between the three branches of the Virgin Islands government; *see Government of the Virgin Islands v. Eleventh Legislature*, 13 V.I. 53, 83 (D.V.I. 1976), *aff'd* 536 F.2d 34 (3d Cir. 1976), but it is a far different thing to suggest that those principles apply to the vertical relationship between the federal government and the territorial government. We have found no case, nor has the Territorial Court presented us with any case, which would suggest that Congress' plenary power vis-a-vis the territories is limited in this way. Indeed, it has long been established that only the most fundamental constitutional rights extend to this territory where Congress is silent on the subject. *See Soto v. United States*, 1 V.I. 536, 273 F.2d 628 (3d Cir. 1921). *Government of the Virgin Islands v. Rojas*, 6 V.I. 476, 285 F. Supp. 126 (D.V.I. 1968). We do not believe that the framers intended to apply separation of powers principles to the relationship between the branches of the federal government and those territorial governments whose existence was to be a product of the will of Congress.

Furthermore, as the Third Circuit pointed out, the inquiry where an activity is challenged under the guise of separation of powers concerns only the "extent to which the challenged action prevents the affected branch from accomplishing constitutionally assigned functions." *Matter of President's Com'n on Organized Crime*, 783 F.2d

at 370 (3d Cir. 1986). If, and only if, the potential for disruption exists, does a Court concern itself with whether the constitutional objective of the intervening branch justifies the intrusion. *Id.* The Territorial Court does not carry out any constitutionally mandated functions, and in fact it is not a constitutional court. *See, e.g., Government of the Virgin Islands v. Bell,* 6 V.I. 456, 392 F.2d 207 (3d Cir. 1968), *cert. denied,* 398 U.S. 937 (1969) (The District Court of the Virgin Islands is not a constitutional court).

As the Supreme Court wrote in *American Insurance Company v. Canter,* 26 U.S. 388 [511] (1 Pet.) (1828), referring to the Territorial courts of the then territory of Florida:

> . . . These courts, then, are not constitutional courts, in which the judicial power conferred by the Constitution on the general government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States . . .

Id. at ——. Indeed, merely because a Court has constitutional functions does not *ipso facto* make it a constitutional court. *Mookini v. United States,* 303 U.S. 201, 205 (1937).

Yet even if this distinction be blurred, it is this Court and not the plaintiff which is repository of such constitutional functions in this territory. See 48 U.S.C.A. § 1612

(a); *see generally, United States v. George*, 625 F.2d 1081 (3d Cir. 1980). Thus, as to the Territorial Court we have no occasion to even reach separation of powers questions.[6] It seems specious to argue that these principles apply to govern the relationship between one government whose very existence is dependent upon the other. Moreover, even if it could be said that the Territorial Court was a co-equal branch which carried out constitutional functions so as to require justification for an intrusion by a federal executive or legislative branch agency, we would be hard pressed to find here the potential for disruption necessary for us even to consider whether the objectives of the Inspector justify the intrusion. *See e.g., Chandler v. Judicial Council*, 398 U.S. 74, 84 (1970); *Matter of Certain Complaints Under Investigation*, 785 F.2d 1488 (11th Cir.), *cert. denied*, —— U.S. ——, 106 S.Ct. 3273 (1986). Accordingly, the plaintiff's constitutional argument must fail.

2. *Statutory Interpretation*

The Territorial Court argues that Congress never intended by virtue of the Insular Areas Act to allow the Inspector to audit it. Specifically, it argues that where the Insular Areas Act refers to the government of the Virgin Islands, only the executive branch of the Territorial government is implicated. In support of both this and its constitutional contention it cites 48 U.S.C.A. § 1544 which provides:

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[6] Indeed, the fact that Congress has plenary authority to confer jurisdiction on the courts of a territory as opposed to the jurisdiction imposed by the Constitution upon Article III courts was also recognized in *Canel*. It is this power of Congress that the Supreme Court in *Northern Pipeline Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 70 (1981), declared as an "exception to Article III", and which distinguishes this Court and the Territorial Court from Article III courts whose independence is assured. *But see Mundy v. Weinberger*, 554 F. Supp. 811, 824 (D.C. D.C. 1982).

> All reports required by law to be made by the Governor to any official of the United States shall hereafter be made to the Secretary of the Interior, and the President is authorized to place all matters pertaining to the government of the Virgin Islands under the jurisdiction of the Secretary of the Interior, except matters relating to the judicial branch of said government which on July 22, 1954 are under the supervision of the Director of the Administrative Office of the United States Courts, and the matters relating to the United States Attorney and the United States Marshal which on July 22, 1954 are under the supervision of the Attorney General.

The Territorial Court contends that this section evidences Congress' separation of powers intent vis-a-vis this territory's judiciary.[7] It argues that by virtue of 48 U.S.C. § 1611(a) it is clearly included within the meaning of the phrase "judicial branch of said government." Section 1611(a) reads:

> The judicial power of the Virgin Islands shall be vested in a court of record designated the "District Court of the Virgin Islands" established by Congress, and in such appellate court and lower courts as may have been or may hereafter be established by local law[.]

The Territorial Court puts forward the view that § 1544 required that from July 22, 1954 forward, the supervision of the judiciary of the Virgin Islands, including the Territorial Court, was to be in the hands of the Administrative Office. We disagree.

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[7] At oral argument, the Territorial Court pressed its separation of powers argument to the extent that even absent the existence of § 1544, the Inspector would have no authority to audit the Territorial Court or this Court. The Inspector, on the other hand, could not be tempted into addressing the question whether this Court could be audited by his office absent § 1544.

In interpreting any statute we begin with the language itself. We presume that the legislative intent is expressed by the ordinary common sense meaning of the words used. *Barnes v. Cohen*, 749 F.2d 1009 (3d Cir. 1984), *cert. denied* 471, U.S. 1061 (1985); *United States v. Bey*, 736 F.2d 891 (3d Cir. 1984). We note, therefore, that if Congress meant what the Territorial Court suggests, it used strange words indeed because the words employed read "except matters *which on* July 22, 1954 are under the supervision of . . . (emphasis added).

The meaning suggested by the Territorial Court would be better expressed by words such as ". . . except matters relating to the judicial branch which *are hereby placed* under the supervision of . . . ." The inclusion of the exact date or the reference to the date of the enactment of the act would be superfluous if Congress meant what the Territorial Court argues. Rather, it is more plausible that Congress was referring to matters already placed as of July 22, 1954 into the hands of the Administrative Office. It is undisputed that the Administrative Office did not in 1954, nor does it now, nor has it ever, supervised any court of this territory, except the district court.

This interpretation is borne out by the predecessor of § 1544, Section 39 of the Organic Act of 1936. That section was not repealed in 1954 at the enactment of Section 1544, but was left standing until 1982 at the enactment of the Insular Areas Act of 1982. It stated:

> All reports required by law to be made by the Governor to any official of the United States shall hereafter be made to the Secretary of the Interior, and the President is hereby authorized to place all matters pertaining to the Government of the Virgin Islands under the jurisdiction of the Secretary of the Interior, except matters relating to the judicial branch of said government which shall be as here-

> inbefore provided under the supervision of the Attorney General.—June 22, 1936, ch. 699, § 39, 49 Stat. 1817.

Several points can be drawn. First, that at one time, namely 1936, Congress intended that even this Court was to be supervised by a federal executive branch agency, i.e. attorney general.

More importantly, because Section 39 was repealed in 1982 we can presume Congress chose to leave § 1544 in its stead. We can also presume that Congress, being aware of the administrative practices under its statutes, was aware that in 1982 the Administrative Office was not supervising the Territorial Court. If the 1982 Congress read Section 1544 to require the Administrative Office to supervise the Territorial Court one would presume that it would have corrected that failure. Alternatively, knowing that since 1954 the Territorial Court was not under the supervision of the Administrative Office, it would have amended Section 1544 in 1982 to insure such supervision if Congress desired such supervision. Section 1544, remaining as it read in 1954, suggests that the Territorial Court's position is incorrect.[8]

The explanation we find more likely is that sometime between 1936 and 1954 the supervision of the district court was moved from the Attorney General to the Administrative Office. Section 1544 was, therefore, intended to insure that the agency charged with supervision of the entire federal judiciary ought also supervise this federal court. But the Territorial Court is not a federal court, thus, we find it implausible that Congress would assign the supervision of such a court to an agency which has nothing to do with non-federal courts, and an agency of the federal judicial branch which provides absolutely no financial support to the Territorial Court.

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[8] What legislative history exists aids us little in this inquiry. 100 Cong. Record 10283 (1954).

The Territorial Court, however, does not rest its entire position on the interpretation of § 1544. It also asserts that the Inspector's authority granted to him by virtue of § 1599 is not inclusive of either the judicial or the legislative branch of the territorial government.

The relevant language here is broad and sweeping. The Inspector is given authority to audit "the government of the Virgin Islands" and his power "extend[s] to all activities of the government of the Virgin Islands . . ." *see supra* at note 2. We note that there is no limiting language in these phrases. Elsewhere in the Revised Organic Act where Congress made reference to the branches of the Territorial government, it did so specifically. *See* 48 U.S.C. §§ 1571, 1591, 1611. We presume, therefore, that if Congress wanted to limit the Inspector's authority to the executive branch of the government of the Virgin Islands it would have explicitly done so. *Cf.*, *Russello v. United States*, 464 U.S. 16, 23 (1983) (where Congress includes particular language in one section of a statute, but omits it in another section of the same Act it is generally presumed that Congress acted intentionally and purposely in the disparate inclusion or exclusion) (quotation omitted).

Indeed, if we look to the ordinary meaning of the word "government", we find that the judicial and legislative branches are not necessarily excluded. Black's Law Dictionary 5th Ed. (1979) states at 625: . . . [i]n the United States, government consists of the executive, legislative and judicial branches . . . and it defines a governmental act as "[a]n act in exercise of the police power, or in exercise of constitutional, legislative, administrative or judicial power . . . *Id.* at 626.

Moreover, nothing in the predecessor act suggests that the government comptroller's activities were limited to the executive branch of the territorial government.[9] In

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[9] That statute provides in relevant part:

The secretary of the Interior shall appoint in the Department of the Interior a government comptroller for the Virgin Islands who

fact, that office audited the then Municipal Court of the Virgin Islands on several occasions. Congress is assumed to be familiar with the results of its legislation and the practices of the agencies that it has created, so that subsequent legislation which does not alter that practice is considered to sanction that practice. *See e.g., Acker v. United States*, 620 F.2d 802, 806 (Ct. Cl. 1980); *cf., James v. O'Bannon*, 715 F.2d 794 (3d Cir. 1983), *cert. denied sub nom James v. Cohen*, 470 U.S. 1050 (1985). It is undisputed that the Insular Areas Act did not lessen the scope of the Inspector's oversight authority from that of the predecessor government comptroller. *See* note 2. Therefore, we find no ambiguity in the phrase "Government of the Virgin Islands", and we have no oc-

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shall be under the general supervision of the Secretary of the Interior and shall not be part of any executive department in the government of the Virgin Islands.

. . .

The government comptroller shall audit all accounts and review and recommend adjudication of claims pertaining to the revenue and receipts of the government of the Virgin Islands and of funds derived from bond issues, and he shall audit, in accordance with law and administrative regulations, all expenditures of funds and property pertaining to the government of the Virgin Islands, including those pertaining to trust funds held by the government of the Virgin Islands.

. . .

All departments, agencies, and establishments shall furnish to the government comptroller such information regarding the powers, duties, activities, organizations, financial transactions, and methods of business of their respective offices as he may from time to time require of them; and the government comptroller, or any of his assistants or employees, when duly authorized by him, shall, for the purpose of securing such information, have access to and the right to examine any books, documents, papers, or records of any such department, agency, or establishment. (July 22, 1954 ch. 558, § 17, 68 Stat. 504; Aug. 28, 1958, P. L. 85-851, §§ 4, 5, 72 Stat. 1094, 1095; Mar. 20, 1962, P. L. 87-421, 76 Stat. 43; Aug. 24, 1968; P. L. 90-495; § 9, 82 Stat. 840; Oct. 15, 1977, P. L. 95-134, Title III, § 301(a), 91 Stat. 1162.)

casion to apply other aids in construing the statute at hand. *United States v. Turkette*, 452 U.S. 576 (1981) *on remand*, 656 F.2d 5 (1st Cir. 1981). As a result, we hold that the Inspector's authority to audit encompasses the Territorial Court.

3. *Scope of the Inspector's Subpoena*

The Territorial Court alleges that the Inspector will perform *ultra vires* acts. To prove this, it seeks discovery.[10]

We recognize that our role here is only to determine whether the court's process would be abused by enforcement of the subpoena. *S.E.C. v. Wheeling-Pittsburg Steel Corp.*, 648 F.2d 118, 125 (3d Cir. 1981). Absent the Territorial Court putting in issue the good faith of the Inspector, the subpoena must be enforced if relevant. *Westinghouse, supra* at 166; *cf., NLRB v. Interstate Dress, supra.*

The Territorial Court, however, fails to challenge the relevance of the information sought by the Inspector, and it does not allege that the subpoena is burdensome or overbroad. In any case, our view of the information sought suggests both relevancy and propriety of scope.

At most, the Territorial Court challenges the objectives of the audit; but we note that this does not go to the relevancy or the scope of the documents subpoenaed. Nothing in the record informs this Court how the subpoenaed documents are tied to improper objectives.

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[10] "The granting or denial of discovery in a subpoena enforcement case is within the discretion of the district Court." *United States v. Merit Petroleum, Inc.*, 731 F.2d 901 (TE Ca. 1984) (citations omitted). *See also NLRB v. Interstate Dress Couriers, Inc., supra.* Where as here the issues are largely legal and the factual contentions irrelevant, no discovery is warranted. We see no material issue which requires such discovery. *Cf., Moutevelis v. United States*, 727 F.2d 313, 315 (3d 1984).

Rather, what we have is an assertion that because the indirect audits of the Territorial Court were allegedly performed contrary to the Inspector's rules and regulations, this present audit will also be so conducted. This issue is not relevant at this stage. Summary enforcement hearings are not intended to be exhaustive inquisitions into the practice of regulatory agencies. *Merit Petroleum, supra* at 906. We also fail to see how discovery of the Inspector's past practices vis-a-vis indirect audits of the Territorial Court bears on whether he conducts this direct audit according to law. The plaintiff will have timely opportunity in the future to address such a contention if violations of law or administrative rules take place.

III. CONCLUSION

We conclude that nothing in the doctrine of separation of powers, the Revised Organic Act of 1954, or the Insular Areas Act of 1982 precludes the Inspector from conducting its proposed audit of the Territorial Court or issuing the subpoena at issue here. Since it is not alleged that the subpoena is overbroad, burdensome or that it seeks irrelevant material, it will be enforced. The Territorial Court's arguments having been rejected on the merits, and this Court having no independent basis for jurisdiction over its claim, its complaint seeking declaratory and injunctive relief will be dismissed. Its motions to quash the subpoena, for injunctive relief and for discovery will also be denied.

DATED this 21st day of October, 1987.

APPENDIX D

IN THE DISTRICT COURT
OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

Civil No. 1987/24

TERRITORIAL COURT OF THE VIRGIN ISLANDS,
Plaintiff,

vs.

JAMES R. RICHARDS, in his capacity as INSPECTOR GENERAL, OFFICE OF INSPECTOR GENERAL, U.S. DEPARTMENT OF INTERIOR,

and

NEAL LITTLEFIELD, in his capacity as REGIONAL AUDIT MANAGER, CARIBBEAN REGION, ST. THOMAS, V.I., OFFICE OF INSPECTOR GENERAL, U.S. DEPARTMENT OF INTERIOR,

Defendants.

[Filed Oct. 21, 1987]

ORDER

THESE MATTERS having come before the Court on motion of the defendants for summary enforcement of the subpoena duces tecum directed to the plaintiff, and on motions of the plaintiff for injunctive relief, to quash the subpoena and for discovery, and the Court having filed its opinion of even date herewith, and the premises considered, now therefore it is ORDERED:

THAT the defendants' application for summary enforcement of the January 29, 1987 subpoena duces tecum directed to the plaintiff be, and the same, is hereby GRANTED; and further

THAT the Territorial Court of the Virgin Islands shall comply with that subpoena within 30 days of the date of this order or by a later alternative date designated by the defendants.

It is further ORDERED:

THAT the plaintiff's motions for injunctive relief, to quash the subpoena and for discovery be, and the same, are hereby DENIED; and further

THAT the plaintiff's complaint is DISMISSED, WITH PREJUDICE.

DATED this 21st day of October, 1987.

ENTER:

/s/ David V. O'Brien,
DAVID V. O'BRIEN, Judge

ATTEST:

Orinn Arnold, Clerk

By: Margaret W. Richards
Deputy Clerk

APPENDIX E

IN THE
DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

Civil No. 1987/24

TERRITORIAL COURT OF THE VIRGIN ISLANDS,
Plaintiff,

vs.

JAMES R. RICHARDS, in his capacity as INSPECTOR GENERAL, OFFICE OF INSPECTOR GENERAL, U.S. DEPARTMENT OF INTERIOR,

and

NEAL LITTLEFIELD, in his capacity as REGIONAL AUDIT MANAGER, CARIBBEAN REGION, ST. THOMAS, V.I., OFFICE OF INSPECTOR GENERAL, U.S. DEPARTMENT OF INTERIOR,

Defendants.

[Filed Nov. 12, 1987]

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DAVID V. O'BRIEN, Judge

MEMORANDUM AND ORDER

We are asked to stay the enforcement pending appeal of a subpoena *duces tecum* directed to the Territorial Court of the Virgin Islands. Although we see little likelihood of success on appeal, and, therefore, little danger of irreparable harm, we believe the public interest weighs heavily in favor of granting the stay.

I. FACTS AND PROCEDURAL BACKGROUND

On October 21, 1987 this Court entered a memorandum opinion and order enforcing a subpoena *duces tecum*

issued by the defendant, James R. Richards, Inspector General of the United States Department of Interior, ("Inspector"), and directed to the plaintiff, Territorial Court of the Virgin Islands. *See Territorial Court of the Virgin Islands v. Richards,* —— F. Supp. ——, Civ. No. 1987/24, 1987 St. T. Supp. —— (D.V.I. October 21, 1987) (*"Richards I"*). The subpoena was issued to force compliance with a proposed audit of the Territorial Court by the Inspector. Slip. Op. at 4. The Territorial Court now moves pursuant to Fed.R.Civ. P. 62(c), (d) for a stay of our decision pending its appeal to the United States Court of Appeals for the Third Circuit. It also seeks a waiver of the appeal bond.

In its memorandum in support of this motion, the Territorial Court vehemently challenges the legal basis for the October 21, 1987 decision. It also accuses the Court of an improper motive in reaching its decision. While we expect a nonprevailing party to be disappointed, the virulence and vituperation contained in plaintiff's motion for a stay pending appeal exceeds permissible bounds. Sadly however, we note that this *ad hominem* argumentation has been characteristic of plaintiff's counsel during the entire case, especially towards the opposition.

As to its request for a stay, the Territorial Court centers on the need for the preservation of the *status quo.* It adds that the issue is not whether the Territorial Court can be audited, but who can do the auditing.[1]

The Inspector counters that the *status quo* need not be preserved because an appeal will not be mooted if the audit goes forward. The Inspector adds that a further delay in conducting the audit will harm his ability to "reconstruct accounts". He further suggests that it is in the public interest to have the results of the audit without delay.

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[1] Plaintiff's October 23, 1987 memorandum at 3.

II. DISCUSSION

We must consider four factors in addressing an application for a discretionary stay: whether there is a strong likelihood of success on the merits of the appeal; whether the movant will suffer irreparable harm if the stay is not granted; whether a stay will impose substantial harm on the other interested parties; and whether a stay is in the public interest. *Atlantic Richfield Company v. Federal Trade Commission*, 398 F. Supp. 1, 17 (S.D. Tex. 1975) *aff'd*, 546 F.2d 646 (5th Cir. 1977) (citations omitted).[2] Each of these elements ought to be applied flexibly according to the unique circumstances of the case. *McSurely v. McClellan*, 697 F.2d 309, 317 (D.C. Cir. 1982), *cert. denied*, —— U.S. ——, 106 S.Ct. 525 (1985). We will address each of the elements *seriatim*.

A. *Likelihood of Success on Appeal*

This question would seem to require us to address the enforcement issue again. Obviously, we cannot conclude that the Territorial Court is likely to succeed on appeal without shedding doubt on our original opinion. On the other hand, one out of every ten appeals from rulings of this Court is successful. Perhaps plaintiff will fall within that ten percent.

---

[2] The Territorial Court argues in its reply brief that it is entitled to a stay as a matter of law pursuant to Fed.R.Civ.P. 62(d). It cites Justice Rehnquist's in chambers opinion sitting as a Circuit Justice in *Becker v. United States*, 451 U.S. 1307 (1981). However, we note that Justice Rehnquist's discussion of the issue was in dicta because he candidly admitted that he did not need to reach the issue of whether 62(c) or 62(d) applied. *Id.* at 1308-1309. In fact, Justice Rehnquist went on to balance the equities. *Id.* at 1311. Moreover, since he was sitting as a Circuit Justice, his decision does not carry the precedential value of an opinion of the United States Supreme Court. We also note that there is strong precedent holding to the contrary. *Donovan v. Fall River Foundry Co., Inc.*, 696 F.2d 524 (7th Cir. 1982). In any case, our decision to grant the stay assuming 62(c) applies, forecloses the necessity of reaching the issue.

At best, the question is whether the underlying decision to enforce is a close one. Given our view of the paramount role the federal government plays in territorial affairs, a situation which we do not necessarily endorse, we cannot help but conclude that plaintiff's likelihood of success is very slim indeed.

B. *Irreparable Harm*

Some courts have found maintenance of the *status quo* a controlling factor in this analysis. *See e.g., Shick v. Farmer Home Administration*, 583 F. Supp. 539 (D. Mass. 1984), *modified on other grounds*, 748 F.2d 35 (1st Cir. 1984). Other courts have not, depending upon the circumstances of the case. *Boise Cascade Corporation v. Federal Trade Commission*, 498 F. Supp. 782, 783 (D. Del. 1980); *Atlantic Richfield Co.*, 398 F. Supp. at 18.

In addition, the potential for mootness of an appeal absent a stay has been given great weight by some courts. *See e.g., NLRB v. General Motors Corp.*, 510 F. Supp. 341, 342 (S.D. Ohio 1980). While other courts believe such a consideration improper. *See e.g., Dellums v. Smith*, 577 F. Supp. 1456, 1458 (N.D. Cal. 1984) (citations omitted).

Without adopting either position on these two questions, we find little merit in the Inspector's argument concerning mootness. It is true that *Gluck v. United States*, 771 F.2d 750, 753 (3d Cir. 1985) suggests that an appeal is not mooted so long as relief can be granted. However, it is at best speculative to ponder in this particular case whether the future will leave a remedy available to the Circuit if necessary.

On the other hand, the Territorial Court, as it admits, cannot claim it is harmed by an audit *per se*. Thus, its argument for preservation of the *status quo* on this ground is shaky. Rather, we glean from its argument

the notion that somehow the constitutional structure of our republic is harmed if a judicial branch agency of the territory of the Virgin Islands is audited by an executive branch agency of the federal government.

If we are incorrect, and the doctrine of separation of powers limits the Inspector's authority in the way suggested by the Territorial Court, then indeed there is some damage to our constitutional structure if the audit goes forward. However, we prefer to discuss such harm within our consideration of the public interest.[3]

C. *Harm to the Inspector*

We do not perceive the degree of harm to the Inspector which he so strongly asserts will occur if the stay is granted. It was four years from the time he was statutorily permitted to audit the government of the Virgin Islands, to the time he sought to audit the Territorial Court. *Richards I*, Slip. Op. at 3. While it may be true that his task grows more difficult with each delay, there is nothing in the record which suggests that an audit must be conducted with exigency. There is no allegation that the affairs of the Territorial Court are in anything but proper order, nor is there evidence that a delay in the audit pending appeal would alter the circumstances. Thus, we find it hard to believe that the Inspector's

---

[3] It is true that interference with a constitutional right is considered an irreparable injury. *West Indian Company, Ltd. v. Government of the Virgin Islands*, 643 F. Supp. 869, 883 (D.V.I. 1986), *aff'd*, 812 F.2d 134 (3d Cir. 1987) (citations omitted). The doctrine of separation of powers, however, is a not constitutional right similar for example, to free exercise rights. Rather it is a constitutional principle. *Buckley v. Valeo*, 424 U.S. 1, 120 (1975) (*per curiam*). The primary purpose of the doctrine is to protect the *people* from oppression. *Consumer Energy council of America v. F.E.R.S.*, 673 F.2d 421, 425 (D.C. Cir. 1982), *aff'd*, —— U.S. ——, 103 S.Ct. 3556 (1983) (emphasis mine). In the unique circumstances of this case, therefore, it is the people who will most directly suffer if the Territorial Court is unconstitutionally audited.

affairs are compromised by an additional delay, probably measured to be several months.

D. *Public Interest*

The question before us in *Richards I* was one of first impression. Neither the Inspector nor the Territorial Court referred us to any case which shed light on the relationship between the federal government and its territories vis-a-vis the doctrine of separation of powers. Indeed, our research found none directly on point. Thus, although we viewed the Territorial Court's defenses as meritless, it was still a unique issue.

The people of the Virgin Islands have a strong interest in having the relationship of the respective levels of government clearly defined. This is especially true since it appears that the unincorporated status of this territory is unlikely to change in the foreseeable future.

While it may be true that the people of this territory have an interest in seeing a proper audit of its government done with dispatch, we are impressed with the argument that the application of the proper rule of law carries greater import. The issue as the Territorial Court suggests, is: who may constitutionally audit the Territorial Court. While our decision in *Richards I* holds that the Inspector may constitutionally do so; Slip. Op. at 1075, we are not unmindful that the Territorial Court also asserts that Congress has statutorily required the Administrative Office of the United States Courts to be the agency charged with such responsibilities. Slip. Op. at 16. We find no merit in this statutory interpretation. Slip. Op. at 15-19.

Nevertheless, because the question is one where the Third Circuit's review is plenary, and there is an inherent public interest in the application of the proper law, especially where the question involves the constitutional assignment of power, we believe that the inter-

ests weigh heavily in maintaining the *status quo* until the Circuit addresses this case of first impression. Other courts have thought likewise. *See e.g., First Amendment Coalition v. Judicial Inquiry and Review Board*, 584 F. Supp. 635, 638 (E.D. Pa. 1984).

III. CONCLUSION

The appeal of our decision in *Richards I* does not seem to us to have much hope of success. In addition we are hard pressed to find an explicit injury to the Territorial Court absent a stay. Nevertheless, the unique circumstances of this case suggest that a delay pending appeal poses little threat of harm to the Inspector, and that there is a strong public interest in maintaining the *status quo* pending word from the Circuit on this issue. For these reasons the stay will be granted. We also see little need for an appeal bond. It will be waived.

DATED this 12th day of November, 1987.

APPENDIX F

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article IV, § 3, cl. 2 of the Constitution of the United States provides, in part, that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States * * *."

Section 610 of the Judicial Code, 28 U.S.C. § 610, provides that:

> Courts defined
>
> As used in this chapter the word "courts" includes the courts of appeals and district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, the United States Claims Court and the Court of International Trade.

Section 17 of the Revised Organic Act of 1954, as added by Pub. L. 97-357, § 309(b), 96 Stat. 1710 (1982), and as codified at 48 U.S.C. § 1599, provides, in pertinent part:

> Transfer of functions from government comptroller for Virgin Islands to Inspector General, Department of the Interior
>
> (a) Functions, powers and duties transferred
>
> The following functions, powers, and duties heretofore vested in the government comptroller for the Virgin Islands are hereby transferred to the Inspector General, Department of the Interior, for the purpose of establishing an organization which will maintain a satisfactory level of independent audit oversight of the government of the Virgin Islands:
>
> (1) The authority to audit all accounts pertaining to the revenue and receipts of the gov-

ernment of the Virgin Islands, and of funds derived from bond issues, and the authority to audit, in accordance with law and administrative regulations, all expenditures of funds and property pertaining to the government of the Virgin Islands including those pertaining to trust funds held by the government of the Virgin Islands.

(2) The authority to report to the Secretary of the Interior and the Governor of the Virgin Islands all failures to collect amounts due the government, and expenditures of funds or uses of property which are irregular or not pursuant to law.

(b) Scope of Authority transferred

The authority granted in paragraph (a) of this section shall extend to all activities of the government of the Virgin Islands, and shall be in addition to the authority conferred upon the Inspector General by the Inspector General Act of 1978 (92 Stat. 1101), as amended.

Section 21 of the Revised Organic Act of 1954, as amended and as codified at 48 U.S.C. § 1611, provides, in pertinent part:

District Court of the Virgin Islands; local courts; jurisdiction; practice and procedure

(a) District Court of the Virgin Islands; local courts

The judicial power of the Virgin Islands shall be vested in a court of record designated the "District Court of the Virgin Islands" established by Congress, and in such appellate court and lower local courts as may have been or may hereafter be established by local law.

(b) Jurisdiction

The legislature of the Virgin Islands may vest in the courts of the Virgin Islands established by local law jurisdiction over all causes in the Virgin Islands over which any court established by the Constitution and laws of the United States does not have exclusive jurisdiction. Such jurisdiction shall be subject to the concurrent jurisdiction conferred on the District Court of the Virgin Islands by section 1612(a) and (c) of this title.

Section 30 of the Revised Organic Act of 1954, as codified at 48 U.S.C. § 1544, provides:

Reports by Governor; jurisdiction of Secretary of the Interior; exceptions

All reports required by law to be made by the Governor to any official of the United States shall hereafter be made to the Secretary of the Interior, and the President is authorized to place all matters pertaining to the government of the Virgin Islands under the jurisdiction of the Secretary of the Interior, except matters relating to the judicial branch of said government which on July 22, 1954 are under the supervision of the Director of the Administrative Office of the United States Courts, and the matters relating to the United States Attorney and the United States Marshal which on July 22, 1954 are under the supervision of the Attorney General.

Section 2 of Title 4 of the Virgin Islands Code, as amended, provides:

Courts of the Territory

The judicial power of the Territory is vested in a court of general jurisdiction created by section 21 of the Revised Organic Act of the Virgin Islands, approved July 22, 1954, as amended, designated the "District Court of the Virgin Islands", and in a court of local jurisdiction to be designated the "Territorial Court of the Virgin Islands". Each court is a court of record.

Supreme Court, U.S.
FILED
OCT 24 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-328

In the Supreme Court of the United States

OCTOBER TERM, 1988

TERRITORIAL COURT OF THE VIRGIN ISLANDS,
PETITIONER

v.

JAMES R. RICHARDS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General
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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-328

TERRITORIAL COURT OF THE VIRGIN ISLANDS,
PETITIONER

v.

JAMES R. RICHARDS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner challenges the court of appeals' ruling that the Inspector General of the Department of the Interior has express authority under an Act of Congress to conduct an audit of petitioner, a local court of a United States territory established under Article IV of the United States Constitution, and that such auditing authority does not violate the constitutional separation of powers.

1. In January 1987, respondent James R. Richards, who is the Inspector General of the Department

of the Interior, caused a subpoena to be served on petitioner, the Territorial Court of the Virgin Islands (Pet. App. 17a).[1] The subpoena, which was issued in furtherance of the Inspector General's audit of petitioner, called on petitioner to produce for examination records that showed how the court recorded the collection of revenues, accounted for its expenditures and purchases, recorded and collected fines, managed escrow accounts where bail monies were deposited, kept control of its equipment and other assets, and maintained time, attendance, and payroll records (*id.* at 16a-17a). Petitioner's records had on several prior occasions been included in audits by the Inspector General (*id.* at 19a), and petitioner's predecessor court, the Municipal Court of the Virgin Islands, had also been audited by the Department of the Interior (*id.* at 30a-31a & n.9).

Petitioner filed a complaint in the District Court of the Virgin Islands seeking declaratory and injunctive relief against the subpoena and any audit. Respondents counterclaimed for enforcement of the subpoena and shortly thereafter moved for summary enforcement. In support of the motion for enforcement, respondents established that the subpoena meets the three-pronged test applicable to subpoenas like the one at issue. See, *e.g.*, *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964); *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652 (1950); *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 208-209 (1946); see also *United States* v. *Westinghouse Electric Corp.*, 788 F.2d 164, 166 (3d Cir.

[1] The subpoena was served by Neal Littlefield, the other named respondent in this case, who was the Caribbean regional audit manager for the Inspector General at the time. See Pet. App. 16a.

1986) (test applied to Inspector General subpoenas). In particular, respondents showed, and the district court concluded (Pet. App. 26a-32a), that the subpoena is authorized by the Insular Areas Act of 1982, which requires the Inspector General to maintain a "satisfactory level of independent audit oversight" of the accounts of the government of the Virgin Islands and provides that "[t]he authority granted * * * shall extend to all activities of the government of the Virgin Islands, and shall be in addition to the authority conferred * * * by the Inspector General Act of 1978." 48 U.S.C. 1599. The Inspector General Act of 1978 in turn authorizes the use of a subpoena to fulfill the Inspector General's responsibilities. 5 U.S.C. App. 6(a)(4).[2]

2. The court of appeals, like the district court, rejected petitioner's contention that only the Administrative Office of the United States Courts, and not the Inspector General of the Department of the Interior, is statutorily authorized to audit the Territorial Court (Pet. App. 3a-6a). The court first held, contrary to petitioner's suggestion, that the Inspector General's statutory authority to audit "all activities of the government of the Virgin Islands" (48 U.S.C. 1599) is not limited to activities of the executive departments of the Virgin Islands government. The

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[2] With respect to the second and third prongs of the test laid down in *Powell* and *Westinghouse*, respondents demonstrated the relevancy of the documents sought and the steps taken to avoid any undue burden on petitioner. Petitioner presented no evidence suggesting that the subpoena might be burdensome or that the documents sought were not relevant (Pet. App. 9a-10a). The district court (*id.* at 32a) and the court of appeals (*id.* at 9a-10a) found that respondents had satisfied those requirements, which are not at issue in this Court.

court noted "the breadth of the language employed in the statute and the lack of any valid reason" why Congress would choose to exclude the Virgin Islands judiciary or legislature from federal audit scrutiny (Pet. App. 6a). The court of appeals similarly rejected petitioner's contention that the "except" clause of 48 U.S.C. 1544 establishes that only the Administrative Office of the United States Courts is authorized to audit the Territorial Court. That section places in the Secretary of the Interior responsibility for all Virgin Island government matters "except matters relating to the judicial branch of said government which on July 22, 1954 are under the supervision of the Director of the Administrative Office of the United States Courts." The court of appeals explained (Pet. App. 7a) that the "except" clause does not apply to petitioner, because the Territorial Court was not under the supervision of the Administrative Office on July 22, 1954, and, indeed, has never been under that Office's supervision. Thus, insofar as the Virgin Islands are concerned, the Administrative Office's authority, which is set forth in 28 U.S.C. 604(a)(11), 610, extends only to the District Court of the Virgin Islands.

The court of appeals also rejected petitioner's argument that an audit of the Territorial Court by an executive agency violates the constitutional doctrine of separation of powers (Pet. App. 7a-8a). Congress established the present Virgin Islands government in the exercise of its power under the Constitution (U.S. Const. Art. IV, § 3, Cl. 2) to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." The court of appeals "[a]ssum[ed], without deciding, that separation of powers principles may be viable as among the branches of the territorial government"

(Pet. App. 8a). But the court of appeals concluded, following the district court (*id.* at 24a-26a), that such principles do not constrain Congress in its authority to legislate for the territories (*id.* at 8a).

3. The decision of the court of appeals does not conflict with any decision of this Court or of any other court of appeals. Nor does the decision raise any question of general importance. Indeed, the Third Circuit and the District Court of the Virgin Islands are uniquely positioned to speak authoritatively on questions peculiar to the Virgin Islands. In this case, moreover, the concurrent judgment of both lower courts is correct and does not warrant further review.

The Inspector General has express statutory authority under 48 U.S.C. 1599 to audit "all activities of the [Territorial] government." As the court of appeals explained (Pet. App. 6a), that language does not contain an exception for the judicial (or legislative) branch of the territorial government.[3] Cf. *United States* v. *Providence Journal Co.*, No. 87-65 (May 2, 1988) (phrase "United States" in 28 U.S.C. 518(a) is not restricted to Executive Branch). Nor, as the court of appeals also noted (Pet. App. 6a), is there anything about the function of auditing—or the prospect of the Inspector General's auditing the Territorial Court—that would suggest that Congress must have intended a narrower meaning than the

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[3] Petitioner suggests (Pet. 10) that the "common sense" reading of the phrase, "government of the Virgin Islands," would construe it to refer only to the executive branch. But that view is contradicted by the language of the Revised Organic Act as a whole. For example, Congress provided that the "government of the Virgin Islands shall have the powers set forth in this chapter" and then enumerated powers that are obviously legislative or judicial in nature. 48 U.S.C. 1541. See also Pet. App. 30a.

broad statutory language suggests. In fact, as the district court explained (*id.* at 29a), the practice of the Inspector General's predecessor had been to audit the local territorial court, and Congress presumably acted with knowledge of existing audit practices when it transferred the auditing authority, without limitation or alteration, to the Inspector General in 1982.

The statutes relevant to the Administrative Office's powers offer no more support for petitioner's contention. Thus, as the court of appeals noted (Pet. App. 7a), Sections 604(a)(11) and 610 of Title 28, U.S.C., expressly authorize the Administrative Office to audit the District Court of the Virgin Islands; they do not mention the local Territorial Court. And the "except" clause of 48 U.S.C. 1544 does not take petitioner outside the jurisdiction of the Secretary of the Interior, because petitioner was not in 1954, and has never been, under the supervision of the Administrative Office (Pet. App. 7a). Indeed, whereas the Inspector General and his predecessor (the government comptroller) have regularly asserted authority to audit the local Territorial Court, the Administrative Office has never asserted such authority (Pet. 17 n.19).

The lower courts were also correct in rejecting petitioner's constitutional claim that the audit proposed is inconsistent with the separation of powers. The doctrine of separation of powers concerns the relations between the co-equal branches of the national government, branches that are established directly by the Constitution and not by Congress. The doctrine has no application—and petitioner does not show that it has ever been applied—to restrict Congress's power to define the "vertical" relationship between the national government and a territorial gov-

ernment, the latter of which is created not by the Constitution but by Congress pursuant to its plenary territorial-legislation power (U.S. Const. Art. IV, § 3, Cl. 2). The Territorial Court here is not an Article III court (see *American Insurance Co.* v. *Canter*, 26 U.S. (1 Pet.) 511, 546 (1828); *United States* v. *Canel*, 708 F.2d 894, 896 (3d Cir.), cert. denied, 464 U.S. 852 (1983); *United States* v. *George*, 625 F.2d 1081, 1089 (3d Cir. 1980); *Government of Virgin Islands* v. *Bell*, 392 F.2d 207, 209 (3d Cir. 1968)) and so is not part of one of the three co-equal branches of the national government to which the separation of powers doctrine applies. In any event, an audit such as is proposed in this case does not seriously threaten the judicial functions and independence that the separation of powers doctrine protects. The court of appeals concluded that the Territorial Court made no showing that the audit would be impermissibly intrusive or that it would even be burdensome (Pet. App. 10a), and the district court specifically noted that it would be "hard pressed to find here the potential for disruption" of the court's business (*id.* at 26a).[4]

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[4] Petitioner suggests (Pet. 24-27) that the Court hold the present petition pending resolution of *Barnard* v. *Thorstenn*, No. 87-1939, and *Virgin Island Bar Ass'n* v. *Thorstenn*, No. 87-2008, because the Court may in those cases address the relationship between the Territorial Court and the District Court of the Virgin Islands. But the question presented in those cases concerns the validity of a local residency requirement for the practice of law and has no bearing on the question presented by petitioner. Whatever the result in the *Thorstenn* cases, and whatever discussion there might be in those cases of the relation between the District Court and Territorial Court, the court of appeals' ruling rejecting petitioner's statutory and constitutional challenges to the Inspec-

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

OCTOBER 1988

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tor General's auditing authority would remain correct. Accordingly, the present petition should not be held pending resolution of the *Thorstenn* cases.

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REPLY BRIEF FOR PETITIONER

The Government's Memorandum for the Respondents in Opposition ("Opp.") is not, strictly speaking, a response at all. The Government simply ignores the points raised by the Territorial Court in its Petition, not even attempting to explain why the Territorial Court's statutory readings might be wrong, why the legislative history it cites might not be probative, how the cases on which it relies might be distinguishable, or why the logical arguments might not make sense. The Government simply recites the holdings below and dismisses the Petition as not raising an important question. Even the District Court below, however, recognized that the case pre-

sented a significant question of "first impression" concerning "the constitutional assignment of power" and that it was important that "the relationship of the respective levels of government [be] clearly defined." Pet. App. 42a-43a. The conclusion is inescapable that the Government avoids answering the Territorial Court's arguments for the simple reason that it has no good answers.

1. In its Petition, the Territorial Court explained why Section 17 of the Revised Organic Act, which authorizes the Department of the Interior to audit "the government of the Virgin Islands," 48 U.S.C. § 1599, does not confer on Interior any authority to audit the *judicial branch* of the Virgin Islands. The Territorial Court noted:

- Section 17 appears in the "executive branch" subchapter of the Act, not in the "judicial branch" or even the "fiscal provisions" subchapters. Pet. 7-8.
- In the legislative history of the Act, Congress used the words "Virgin Islands government" to refer to the executive branch. Pet. 10.
- Court decisions in the immediate wake of the Act concluded that the phrase "government of the Virgin Islands" referred to the political branches. Pet. 10 & n.11.

The Government presents no response to these points. On the question of construing Section 17, the Government does not even acknowledge petitioner's catalogue of regulations (including Department of Justice regulations), statutes, and judicial decisions construing "government" as not including the judiciary, Pet. 8-10 & nn.7-10, but simply cites an irrelevant decision construing "United States" as not limited to the executive. Opp. 5.

2. The Territorial Court explained in its Petition that Section 30 of the Act excepted from the jurisdiction of Interior matters relating to "the judicial branch," 48 U.S.C. § 1544, consistent with the foregoing construction

of Section 17. The Territorial Court also detailed why this deliberate exception—based on Congress's separation of powers concerns—was not restricted to the District Court of the Virgin Islands but also embraced the Territorial Court.[1] The Territorial Court noted:

- The literal language of Section 30 is descriptive rather than limiting, evincing an intent to except from Interior *all* matters relating to the judicial branch. Pet. 13.

- The legislative history specifies that "Section 30 provides generally that matters pertaining to the government of the Virgin Islands, *except for the judiciary*, shall be placed under the jurisdiction of the Secretary of the Interior," H.R. Conf. Rep. No. 2105, 83d Cong., 2d Sess. 22 (1954) (emphasis supplied), and the same Act provides that the Virgin Islands judiciary includes the District Court *and* local courts such as the Territorial Court. 48 U.S.C. § 1611(a).

- The reading of the court below—that only matters vested in the Administrative Office as of July 22, 1954 were excepted—would "freeze" the allocation of authority between the AO and Interior as of that date, a clearly unintended result. Pet. 13-14.

- Applying the same construction to the parallel provision of Section 30—concerning the U.S. Attorney and U.S. Marshal—would place all duties of those officials added after July 22, 1954 under the Secretary of the Interior rather than the Attorney General, again a clearly unintended result (and one the

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[1] The Government quotes the court below to the effect that there was no "'valid reason'" why Congress would exclude the Virgin Islands judiciary from the scope of Interior's audit authority. Opp. 4 (quoting Pet. App. 6a). Congress, however, had reason enough to create the express exception in Section 30, to preclude intrusions on the judiciary of the sort at issue here. *See* Pet. 11, 17-20.

Solicitor General understandably does not accept). Pet. 14.

- The decision below leads to the absurd result that the District Court and the Territorial Court—component parts of the one judicial branch of the Virgin Islands, with overlapping jurisdiction, personnel, funding, and bar, will be audited by vastly different entities (AO and Interior) in different branches of the Federal Government. Pet. 14-16.

Again, the Government ignores each of these points, offering no response to any of them.

3. On the constitutional issue, the Government invokes the asserted "plenary power" of Congress under Article IV, failing to address Congress's own unambiguous decision to apply the separation of powers to the Virgin Islands. *See* Pet. 21-22. The Government also argues that separation of powers concerns do not apply because the Territorial Court (like the District Court of the Virgin Islands) is not an Article III court, even though separation of powers principles have been applied to non-Article III tribunals, *see* Pet. 20 n.25, and the Government cites no case holding that they should not be fully applicable in such situations.

The Territorial Court explained that the decision below —holding that the separation of powers applied in the Virgin Islands, but *not* if invoked against the Federal Government—was a departure from the test for applying constitutional protections to the territories established in the *Insular Cases*.[2] Pet. 20-24. Noting that the court below cited no ruling from any court in support of its new approach, petitioners issued an unambiguous challenge to the Government, stating that "[c]ounsel is aware of no case—until the decision below—ruling that a constitutional protection *has* followed the Flag, but *not* if

[2] *Downes* v. *Bidwell*, 182 U.S. 244 (1901); *Armstrong* v. *United States*, 182 U.S. 243 (1901); *Dooley* v. *United States*, 182 U.S. 222 (1901); *De Lima* v. *Bidwell*, 182 U.S. 1 (1901).

the protection is invoked against the Federal Government." Pet. 23 (emphasis in original). The Government could not respond with a single case for the same reason the court below could cite no precedent—its decision is, quite literally, unprecedented.

This Court in *Springer* v. *Government of the Philippine Islands*, 277 U.S. 189 (1928), applied the separation of powers to a territory, without any suggestion that it was applying a new species of the doctrine, one that would offer no protection in the face of intrusions from other branches of the Federal Government. The underlying concern of the separation of powers is implicated by executive intrusions on the judiciary regardless of whether those intrusions originate with the territorial executive or—as here—with Interior.

In addition, Congress itself has spoken to the question of whether constitutional protections—if applicable in the Virgin Islands—should apply differently there than they do stateside. In Section 3 of the Revised Organic Act, Congress extended certain provisions of the Constitution to the Virgin Islands and specified that they "shall have the same force and effect there as in the United States or in any State of the United States." 48 U.S.C. § 1561. This guiding principle is applicable to the separation of powers.[3]

4. Perhaps most disturbing about the Government's ostrich-like approach to the Petition is the assertion that the decision below raises no "question of general impor-

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[3] The separation of powers was not enumerated in Section 3 because it is not expressly enumerated in the Constitution itself. Congress clearly applied the principle to the Virgin Islands, however, *see* Pet. 21-22, and indeed even the court below "assum[ed]" that the doctrine applied "as among the branches of the territorial government." Pet. App. 8a. As Section 3 indicates, however, and as the approach of the *Insular Cases* mandates, if the doctrine applies it applies with the "same force and effect" in the Virgin Islands as on the mainland.

tance." Opp. 5.[4] While stating this, the Government offers no response to the statement in the Petition that the question presented is of broader significance, because of its direct relevance to the stature and independence of other territorial courts from Guam to Puerto Rico. Pet. 6. Nor does the Government explain how an unprecedented departure from the historic approach of the *Insular Cases* can be insignificant, nor how a case that directly implicates Canon 1 of the Code of Judicial Conduct—obligating judges to help ensure judicial independence—can be so cavalierly dismissed. Pet. 6.

As outlined in the Petition, Pet. 6-7, the question presented is of vital significance, and ignoring it will not make it less so. In addition, the case is important to the Territorial Court, the judges who sit on that bench, and those who appear before them seeking justice. The Justices of this Court can readily recognize that it is not pleasant for jurists to become litigants, and that a decision to do so would be undertaken only under the most serious circumstances. The Territorial Court concluded that Interior's assertion of authority to probe the court's internal workings was a direct threat to "the integrity and independence of the judiciary," Code of Judicial Conduct, Canon 1, and could not go unchallenged. This Court is protected against such executive branch intrusions by the AO—a judicial branch agency—and Congress clearly intended that the same protection extend to the Virgin Islands judiciary. This conclusion as a matter of statutory construction is compelled by the serious constitutional difficulties with the contrary interpretation adopted below.

The Government has now decided to dismiss the Territorial Court's positions without even seriously addressing them. This Court should not do the same.

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[4] The Government also states that there is no conflict in the circuits, Opp. 5, but of course there cannot be, since all Virgin Islands cases go to the Third Circuit.

CONCLUSION

For the foregoing reasons, and those in the Petition, this Court should grant the writ and reverse the decision below.

Respectfully submitted,

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